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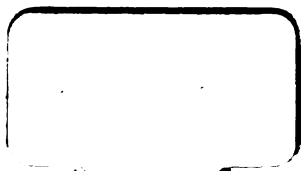
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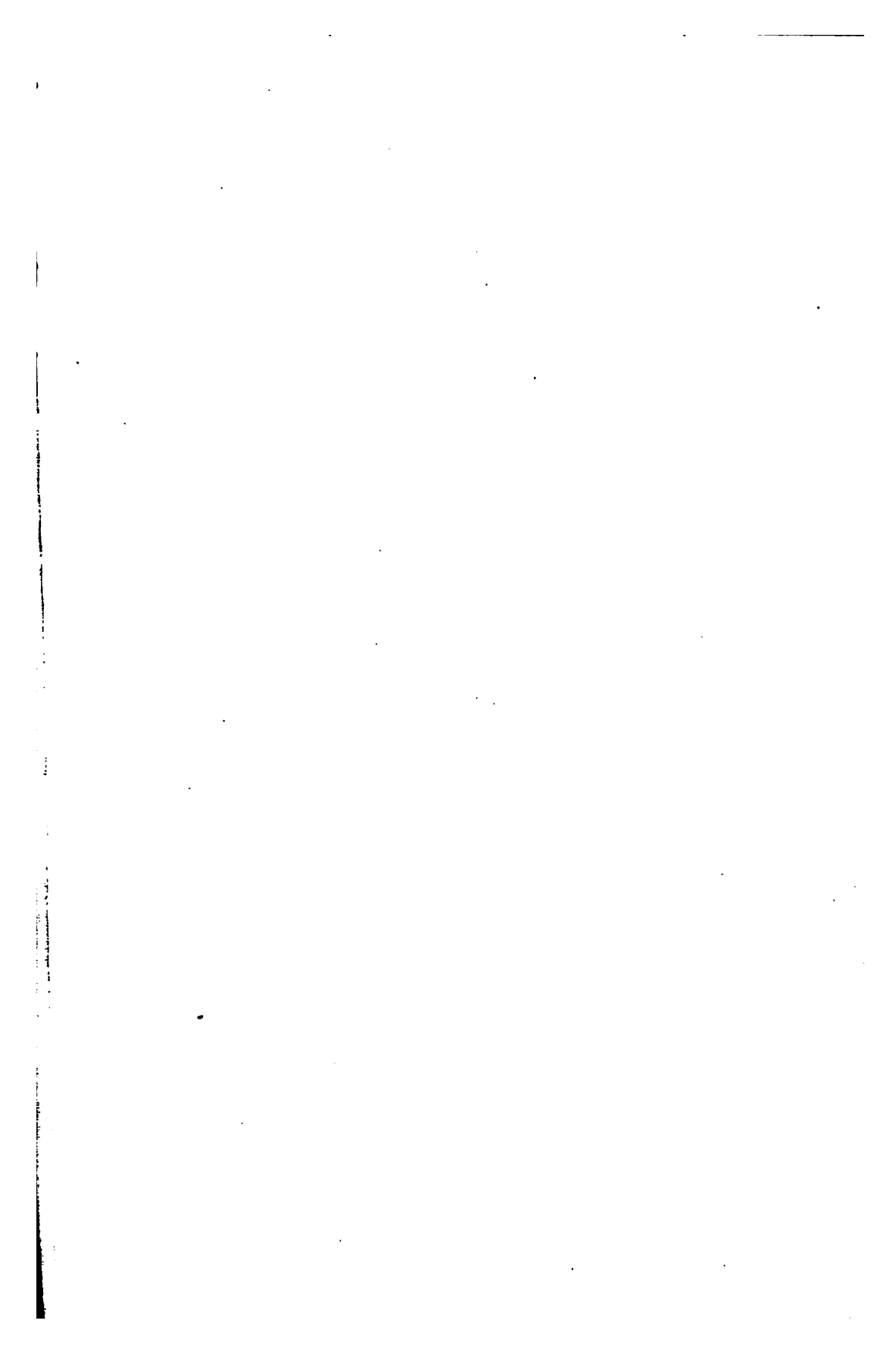
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CONFLICTING
CIVIL CASES
IN
THE TEXAS REPORTS

FROM
SUPREME, VOLUMES 94 TO 102, INCLUSIVE; SOUTHWEST-
ERN REPORTER, VOLUMES 65 TO 137, INCLUSIVE;
CIVIL APPEALS, VOLUMES 25 TO 52, INCLUSIVE; AND
CASES IN PRIOR VOLUMES WHICH HAVE BEEN
HELD IN CONFLICT SINCE THE PUBLICA-
TION OF VOLUMES 1 AND 2; ALSO A TABLE
OF ALL CASES DECIDED BY THE SEV-
ERAL COURTS OF CIVIL APPEALS
WHICH HAVE BEEN PASSED
UPON BY THE SU-
PREME COURT

VOLUME III

*Written, Compiled and Annotated
by*

W. W. KING
and
FRANK H. WASH

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INTRODUCTION.

To the Bench and Bar of Texas:

This work has been written and compiled not in a spirit of criticism of the able and distinguished Judges who occupy the Supreme and Appellate benches, but with the hope that they may as far as possible settle the numerous conflicts in the decisions, and that the trial judges and lawyers may avoid following cases that are no longer authority.

The fact that there are over one thousand cases in conflict covering nearly every question within the domain of jurisprudence can not in the least reflect upon the ability and learning of our Supreme and Appellate Judges. On the contrary, these conflicts are the natural result of our present judicial system in having formerly six and now eight different Courts of Civil Appeals of co-ordinate jurisdiction and each practically a court of last resort acting independently of each other. When these courts were created, the constitutional provision giving the Supreme Court jurisdiction in cases of conflict, was thought to be an adequate remedy for settling all conflicts between courts of Civil Appeals. However, that provision has been so construed that the Supreme Court rarely acquires jurisdiction in such cases, hence the conflicts remain unsettled.

Every Judge and lawyer must realize that every overruled case is liable to lead the judge into error, and the lawyer astray, and that every unsettled conflict renders the administration of the law uncertain. Hence the object and purpose of this work is to clearly point out to the bench and bar of Texas the cases that have been overruled, limited, modified, questioned or qualified, so that they may be taken out of the line of precedent and cease to be dangerous dere-

licts in the sea of jurisprudence and to assemble the unsettled conflicts with a collation of authorities supporting the respective cases in conflict, and when necessary indicating which way lies the weight of authority.

In the syllabi of the cases in conflict we have tried to accurately express the principles announced by the judges delivering the opposing opinions in order to bring to issue the exact conflict. In the notes we have studiously refrained from expressing an opinion as to which decision should prevail, wherever the weight of authority tends wholly one way. On the other hand, when two cases in conflict stand alone and neither is supported by authority or where the weight of authority appears in doubt, we have not hesitated to freely express our opinion.

The preparation of this volume and the two preceding it, has consumed years of toil and research, and if the judges and lawyers of Texas find that the object stated has been accomplished, then we will feel that our labor has not been expended in vain.

W. W. KING.

F. H. WASH.

San Antonio, Texas,

August 15, 1911.

This work has been compiled and written by Judge W. W. King and the Hon. Frank H. Wash of the San Antonio Bar. Judge King for many years occupied the District Bench of Bexar County and Mr. Wash is a B. L. of the University of Virginia and at present the Law Examiner of the Fourth Supreme Judicial District. Both have been for many years actively engaged in the general practice. Hence the publisher submits this work to the public with the assurance that it has been well and thoroughly done.

THE PUBLISHER.

TABLE OF CASES IN CONFLICT.

All leading cases in conflict are included in these direct and reverse tables. Each leading case will sometimes have many cases following same, but merely citing it. Cases of this character owing to their great number are not included in this table, as some of the leading cases showing conflict will undoubtedly be located.

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CONFLICTING CASES.

§ 1. *Acers v. Curtiss*, 68 T. 423 (4 S. W. 551).

In a suit by a surety who has voluntarily paid the debt, the per cent as attorney's fees in addition to the debt, stipulated for as attorney's fees in the event of suit, cannot be collected; a pro rata contribution on the amount actually paid only can be enforced.

CONTRA: *Carpenter v. Minter*, 72 T. 270 (12 S. W. 180).

When a surety before suit is brought thereon pays a note with ten per cent. stipulated attorney's fees and afterwards sues his co-sureties, he is subrogated to the rights of the original holder, and is entitled to recover against his co-sureties the attorney's fees.

NOTE.

The first case is by the Supreme Court and is supported by *Holleman v. Rogers*, 6 T. 91. While the second is by the Commission of Appeals and is supported by the following: *Beeville v. Boyd*, 41 S. W. 670, 42 S. W. 318 (16 C. A. 491); *Bell v. Gammon*, 3 W. & W. Sec. 405; *Laredo E. L. Co. v. United States E. L. Co.*, 26 S. W. 310 (C. A.); *Sublett v. McKinney*, 19 T. 439; *Tutt v. Thornton*, 57 T. 35; *Walters v. Galveston, H. & S. A. Ry. Co.*, 1 W. & W. Sec. 756; *American B. Co. v. National M. Bank*, 99 A. S. R. 466, note.

It is very evident, though not clearly stated in the opinion in *Acers* case, that the court acted upon the rule that when the surety pays the debt of his insolvent principal and seeks contribution against his co-sureties, his action is not upon the original obligation but on the implied assumpsit for the money paid, and as the stipulated attorney's fees was a part of the original obligation only, he was not entitled to recover therefor. And the same rule applies in the surety's action against his principal. *Hays v. Housewright*, 133 S. W. 922.

The Carpenter case was decided upon the theory, that the surety's right of action as against his co-sureties, the principal being insolvent, was "not on the implied assumpsit but on the note itself," and as the attorney's fees were a part of that obligation, he was entitled to recover therefor.

The principle as announced in the Carpenter case and those in accord with it, was the law in Texas till the Supreme Court decided the case of *Faires v. Cockrell*, 88 T. 429 (35 S. W. 191), which expressly overruled the Carpenter case and those in accord with it. *King's Conflicting Cases*, Vol. 11, Sec. 22, 55, 281, 453, 504, 493, 532, and reinstates the *Acers* and *Holliman* cases. The *Faires* case has been approved and followed by *Merchants Natl. Bank v. McAnulty*, 89 T. 128 (38 S. W. 965); *Habeman v. Hendrick*, 66 S. W. 106; *Tarleton v. Orr*, 90 S. W. 536 (40 C. A. 415); *Deleshaw v. Edelen*, 72 S. W. 414 (31 C. A. 418); *Lacey v. O'Reilly*, 89 S. W. 641 (40 C. A. 285); *Halbert v. Paddleford*, 33 S. W. 593; *Scott v. Rowland*, 37 S. W. 381 (14 C. A. 373); *Reed v. Sekenius*, 65 S. W. 487; *Darrow v. Sumerhill*, 93 T. 105 (53 S. W. 684; 77 Am. St. 842); *Miers v. Betterton*, 45 S. W. 433 (18 C. A. 434); *Dwight v. Matthews*, 94 T. 536 (62 S. W. 1053).

Hence the law now is, that where a co-surety pays a draft, note or judgment, the original obligation becomes extinguished and his right of action for contribution against his co-sureties is not on the original obligation but upon the implied assumpsit. And he cannot recover the stipulated attorney's fees, nor the contract rate of interest, and his action is barred in two years from the date of payment.

§ 2. *Adams v. House*, 61 T. 640.

Where land certificates are located and afterwards conveyed, and patents issue in the name of the assignor, the legal title to the lands thereby vests in the assignee.

CONTRA: *Lewis v. Johnson*, 68 T. 448 (4 S. W. 644).

The sale of a land certificate after its location operates only as an equitable assignment of the land located under it.

NOTE.

In the *Adams* case the land certificate was conveyed with covenant of general warranty and for that reason the holder of the certificate prevailed against the purchaser under the patentee, not by reason of his title being the legal title but by estoppel created by reason of the warranty.

The following hold with the Lewis case: *Keyes v. Railway Co.*, 50 T. 169; *Herman v. Reynolds*, 52 T. 391; *Johnson v. Newman*, 43 T. 628; *Goode v. Jasper*, 71 T. — (9 S. W. 132); *Hume v. Ware*, 87 T. 383 (28 S. W. 935).

Many of the decisions draw a distinction as regards the legal and equitable title between conveyances of the certificate alone and conveyances of the certificate and the land upon which it is to be located. In the one the title is equitable. *Thompson v. Langdon*, 87 T. 254 (28 S. W. 931); *Abernathy v. Stone*, 81 T. 434 (16 S. W. 1102). While in the other the title is legal. *Barroum v. Culmell*, 37 S. W. 314 (90 T. 93); *Dupree v. Frank*, 39 S. W. 994; *Baldwin v. Root*, 90 T. 547 (40 S. W. 3).

See Sec. 255 for conflict on kindred question. *Tomkins v. Broocks*,

§ 3. *Alexander v. Thompson*, 38 T. 535.

When the jurisdiction of the court depends upon the amount in controversy, the safe rule is to depend upon the amount of the judgment prayed for.

CONTRA: *Times Publishing Co. v. Hill*, 81 S. W. 806 (36 C. A. 389).

When the jurisdiction of the court depends upon the amount in controversy, the amount in controversy is the amount the allegations of plaintiff's petition, or of defendant's plea in reconvention show to be in controversy, and not the amount claimed in the prayer. A party cannot after showing by allegations in his pleading the amount in controversy, arbitrarily either by increasing or diminishing the amount he prays for, confer or take away from a court, its proper jurisdiction, for example where a defendant pleads in reconvention to a suit properly brought in the justice court, a claim exceeding the court's jurisdiction, but in his prayer only asks a recovery of \$200.00, the justice court acquired no jurisdiction of such plea, as the amount alleged in the petition and not the judgment prayed determines the jurisdiction.

NOTE.

The Hill case is a well-considered case and should be examined in full. It notes two other cases in line with the case of Alexander

v. Thompson, which it declines to follow, viz. *Mulhaul v. Feller*, 1 W. & W. Sec. 1162; and *Scott v. Mexican Natl. Ry. Co.*, 4 W. & W. Sec. 287 (18 S. W. 137).

The case of *Pecos & N. T. Ry. Co. v. Canyon Coal Co.*, 102 T. 478 (119 S. W. 294), was decided by the Supreme Court on certified question from the Court of Civil Appeals from the Second District, and decided the question in favor of the doctrine announced in *Times Publishing Co. v. Hill*, so the question may be considered settled as therein declared, and all contra decisions overruled.

§ 4. *Anderson v. Waco State Bank*, 47 S. W. 552 (C. A.).

Where an appellant has exercised due diligence to perfect his appeal in due time, and, failing, used reasonable dispatch in getting the record to the court on writ of error, a request to affirm on certificate should be denied.

OVERRULED: *Welch v. Weiss*, 99 T. 356 (90 S. W. 160).

Where appellee was entitled to an affirmance on certificate under Art. 1016, his right could not be defeated by appellant suing out a writ of error on the judgment after his default, though his failure to file the transcript in time was not for delay, and the writ of error was perfected before the application was made for affirmance on certificate.

NOTE.

The overruled case is by the Court of Civil Appeals for the Third District, and the overruling case is by the Supreme Court on certified question from the Court of Civil Appeals for the First District.

Article 1016, the construction of which occasions the conflict, is as follows:

"In case the appellant or plaintiff in error shall fail to file a transcript of the record, as directed in this chapter, then it shall be lawful for the appellee or defendant in error to file with the clerk of said court a certificate of the clerk of the district or county court in which any such appeal or writ of error may have been taken, attested by the seal of his court, stating the time when such appeal was perfected or such citation was served; whereupon it shall be the duty of the courts of civil appeals to affirm the judgment of the court below, unless good cause can be shown why such transcript was not filed by

the appellant or plaintiff in error. If a copy of the bond accompanies such certificate of the clerk of the district or county court, the judgment shall in like manner be affirmed against the sureties on such bond."

The following authorities directly or incidentally discuss the question in conflict: *Eppstein v. Holmes*, 64 T. 560; *Thompson v. Anderson*, 82 T. 237 (18 S. A. 153); *Perez v. Garza*, 52 T. 574; *Barber v. Sabine & E. T. Ry. Co.*, 28 S. W. 270 (9 C. A. 93); *Filhol v. Blum Land Co.*, 49 S. W. 669 (19 C. A. 688); *Davidson v. Ikard*, 86 T. 67 (23 S. W. 379); *Scottish Ins. Co. v. Clancy*, 91 T. 467 (44 S. W. 482); *Davis v. Estes*, 23 S. W. 411 (4 C. A. 207); *Laughlin v. Dabney*, 86 T. 120 (24 S. W. 259); *Pickett v. Mead*, 25 S. W. 664 (C. A.); *Sullivan v. Insurance Co.*, 89 T. 667 (36 S. W. 73); *McCurdy v. Connor*, 95 T. 246 (66 S. W. 664); *S. A. & A. P. Ry. Co. v. Ray*, 47 S. W. 477 (19 C. A. 416); *Irwin v. Irwin*, 70 S. W. 102 (C. A.); *Blackman v. Harry*, 93 T. 725 (45 S. W. 610); *Wandelohrn v. Grayson County Natl. Bank*, 90 S. W. 180 (C. A.); *Knox v. Earbee*, 31 S. W. 531 (C. A.); *Texas & N. O. Ry. Co. v. Hare*, 23 S. W. 42 (4 C. A. 18), 93 T. 650; *Morris v. Morgan*, 46 S. W. 667; *Schonfield v. Turner*, 6 S. W. 628, 12 S. W. 626, 75 T. 324; *Hall v. LaSalle Co.*, 46 S. W. 863; *Western U. T. Co. v. Wofford*, 72 S. W. 620 (74 S. W. 943; 32 C. A. 427).

To state more concisely the question in conflict; it is held in the overruled case that where appellee moved to affirm on certificate during the term of the court to which the appeal was returnable, the motion will be denied if the appellant has used reasonable diligence in getting the record to the court on writ of error. While in the overruling case it is held, that if the appellee moves to affirm on certificate during the term of the court at which the appeal is returnable, then the motion will be granted and the appellant's right to a writ of error is lost notwithstanding he has used diligence in getting the record filed or the failure to have same filed was due to accident or design. In other words under article 1016, if the appellant has failed to file the transcript within the time required by law in order to affirm upon certificate, the appellee must file and urge his motion to affirm at the term of the court to which the appeal is returnable. After the expiration of the term, however, he cannot move to affirm upon certificate where the plaintiff in error has shown good cause why the transcript was not filed in time.

In some of the cases above cited it is held or intimated that where the judgment in the lower court is for money, the failure of the appellant or the plaintiff in error to execute a supersedeas bond, should be considered in determining the question in conflict. While

the latest and best considered cases hold that when the right to affirm upon certificate attaches, the character of the judgment appealed from and whether it is superseded or not becomes wholly immaterial.

Practically all of the cases above cited hold, that where an appeal, or writ of error has been perfected and the transcript has not been filed within the 90 days allowed by law, the right to affirm on certificate becomes absolute if the motion therefor is made during the term to which the appeal or writ of error is returnable.

Quere, if the motion to affirm on certificate is filed during the term, but after the filing of the transcript with proper showing for not filing it sooner, is the appellee then entitled to an affirmance? This appears to be answered in the affirmative by the Welch case and in the negative in the Anderson case.

§ 5. American M. B. & L. Assn. v. Harn, 62 S. W. 74.

A stipulation for attorney's fees in note secured by a mechanic's lien upon a homestead is a part of the debt, and is enforceable against the homestead.

OVERRULED BY: American M. B. & L. Assn. v. Harn, 95 Tex. 79, 65 S. W. 176.

A stipulation for attorney's fees in a note secured by a mechanic's lien is not enforceable against a homestead.

NOTE.

It is not the purpose of this work to note conflict between the courts of civil appeals and the Supreme Court arising in the same case, but the above conflict is noted for the reason that when Volume 2 of King's Conflicting Cases was published the case of American M. B. & L. Assn. v. Harn, decided by the Court of Appeals for the third district, had not then reached the Supreme Court, hence it was cited in Kings Conflicting Case, Vol. 2, Sec. 505 as overruling the case of Walters v. Texas B. & L. Assn. The Walters case must, however, now be considered as reinstated. Matthews v. Texas B. & L. Assn., 48 S. W. 744, by the Court of Appeals for the third district is in accord with the overruling case. Sproule v. McFarland, 56 S. W. 693, by the Court of Appeals for the third district holds with the overruled case and must itself be considered overruled. It is very evident, however, that Chief Justice James in the Sproule case was misled by the opinion of the Supreme Court in the

case of *Building & L. Assn. v. Griffin*, 90 Tex. 480, which in effect holds, that attorney's fees are a lien on the property claimed as a homestead, however, the homestead claim was not sustained, hence it is very evident that the Supreme Court did not intend to hold that attorney's fees could be made a lien upon a homestead. Notwithstanding the real or apparent conflicts it must now be considered the settled law of this state, that attorney's fees stipulated in a note secured by mechanic's lien can not be enforced against the homestead.

§ 6. *Arnold v. Anderson*, 93 S. W. 692 (41 C. A. 508).

The Election Law of 1903, commonly termed the Terrell Election Law, provides that the Election Judge shall write his signature upon all ballots, and prohibits the counting of ballots not so signed. Held, that this provision is mandatory and applies to local option elections, and ballots not so signed by the presiding Judge should not be counted.

CONTRA: *Walker v. Mobley*, 103 S. W. 490 (101 T. 28).

The Terrell Election Law has no application to local option elections as to the form of the ballot or the requirement of the signatures thereon by the presiding judge.

NOTE.

The *Arnold* case is followed by the case of *Brigance v. Horlock*, 97 S. W. 1060 (44 C. A. 277), which cites as additional authority the case of *State ex rel. Barry v. Connor*, 23 S. W. 1103 (86 T. 138). The *Barry* case is strongly persuasive that the provision is mandatory and that ballots not so signed by the Judge should not be counted. It will be observed that the *Barry* case was not a local option election, but was a contested city election between two candidates for Mayor and was upon the law as it was prior to the Terrell Election Law. The Act of April 12th, 1892, Sec. 28, relating to elections in cities, provided in substance that no marks of any character shall be placed upon a ballot by which it could thereafter be identified. The court held, that it was not intended by such provision to prohibit the numbering of ballots as provided by Const., art. 6, Sec. 4, and Rev. Stat., art. 1694.

The Court of Criminal Appeals in the following cases has held that the Terrell election law does not apply to local option elections, to-wit: *Ex parte Keith*, 83 S. W. 683 (47 T. Cr. A. 283); *Hanna v.*

State, 87 S. W. 702 (48 T. Cr. A. 269); *Ex parte Anderson*, 102 S. W. 726 (51 T. Cr. A. 239). (Dissenting opinion by Judge Davidson.)

Thus it will be seen that both the Supreme Court and the Court of Criminal Appeals are in accord upon the doctrine that the Terrell Election Law does not apply to local option elections.

The force that would otherwise be given to the *Barry v. Connor* case *supra*, is weakened when it is observed that that decision as well as the decision in the *Walker v. Mobley* case were written by Justice Brown, thus showing that the *Mobley* case, being the later case, was the more mature consideration of the question. As stated above the question in the *Barry* case was a contested city election in which the question of local option was not involved, but the underlying principle seems to be that where any character of election is otherwise specially provided for then the Terrell Election Law does not apply. The question involved in the later case of *Durham v. Rogers*, 106 S. W. 906 (48 C. A. 232), was an election for the change or removal of a county seat, the court used the following language: "In *Walker v. Mobley* it was held that the ticket to be used in local option elections was intended to be a substitute for the official ballot, as provided for in the general election law, and the reasoning which led to this conclusion necessitates a like holding in elections for the removal of county seats. The statute providing for such removals, like the local option statute, prescribes the form of the ticket, as held by the Supreme Court in the case cited, dispensing with the official ballot for such elections, including the mandatory requirement that the official ballot should bear the signature of the presiding officer."

The Supreme Court, Chief Justice Gaines writing the opinion, in *Wallis v. Williams*, 108 S. W. 153 (101 T. 395), in answer to the following certified question from the Court of Civil Appeals of the First Judicial District, "Does the Act of the 29th Legislature regulating the manner of holding elections and prescribing the kind of ballots to be used in elections held in this state (ch. 11, Acts 1st Called Sess. 29th Leg. Laws 1905, p. 520) apply to elections held to determine the location of a county seat?" After citing with approval the opinions of the Court of Criminal Appeals in the cases mentioned above, uses the following language: "We see no good reason for excluding elections under Special Laws technically so called from the operation of the act and including other special elections. Elections under special laws strictly so called are of infrequent occurrence, and as a rule, are subject to precisely the same conditions as an election for the removal of a county seat, for a stock law and the like. There is usually in all such, merely a

proposition to be voted upon and the question is: Shall it be adopted or not? This makes a broad line of distinction between general elections for the choosing of officers to conduct the government in which numerous candidates are to be voted for, and elections specially provided for, in which the people express their will upon a single proposition. It would seem to be a wise policy to except the latter from the provisions of the law regulating the former, and to leave the latter unembarrassed by the restrictions thrown around the former. Many of the regulations as to preparing ballots are inapplicable to a special election, and cannot be literally complied with. Subdivision 6 of art. 3268, Rev. Stat. of 1895, expressly provided that: "In all interpretations the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

"We think the Legislature did not intend to make the Terrell Election Law applicable to special elections. There has never been, so far as we are aware of, any complaint in reference to the operation of laws affecting such elections. The evil was in the laws effecting the general election, and it was the purpose to remedy that only. We answer the question in the negative."

The case of *Orrick v. City of Ft. Worth*, 114 S. W. 684 (52 C. A. 308), was concerning the validity of the city charter which had been declared adopted. At the election held to determine whether or not the new charter should be adopted, a section of the charter provided that the ballots should read, "For the new charter" and "Against the new charter." The charter was attacked on the ground that the ballots were not in accord with the Terrell election law. The Court held that the Terrell Election Law by its own terms does not apply when it is otherwise provided, and we think the special law in question (in the new charter) as the latest expression of the legislative will, should govern." Citing in addition to the cases previously mentioned, the case of *Hash v. Ely*, 100 S. W. 980 (45 C. A. 259). Thus it will be seen that the effect of these latter decisions is to overrule *Arnold v. Anderson*, 93 S. W. 692 (41 C. A. 508), and *Brigance v. Horlock*, 97 S. W. 1062 (44 C. A. 277).

See also *Clarey v. Hurst*, 136 S. W. 840 (C. A.), for a case following *Walker v. Mobley*.

**§ 7. *Atchison T. & S. F. Ry. Co. v. Williams*, 86 S. W. 40.
(38 C. A. 405).**

In a suit by a shipper against a carrier for damages to cattle shipped, account sales taken from the books of the shipper's broker showing weight of the cattle are admissible in evidence upon proof that the books are correctly kept.

DOUBTED: Texas & P. Ry. Co. v. Birdwell, 86 S. W. 1067 (C. A.).

We have very grave doubts as to the admissibility of accounts of sale rendered by a broker to his principal, against a common carrier, as evidence to show prices and weights of cattle sold, without other evidence of such prices and weights, in a suit for damages by the owner against the carrier, alleged to have accrued by loss of weight and market value of the cattle occasioned by the carrier's negligence.

NOTE.

The doubted case was decided by the Court of Civil Appeals for the Second District, while the doubting case was decided by the Court of Civil Appeals for the Fourth District, neither of which have however been reviewed by the Supreme Court.

The Birdwell case is very close to the case of Texas & P. Ry. Co. v. Leggett, 86 S. W. 1066, there a witness who had not seen the cattle weighed, testified to their weights from a record that he has not kept. The same state of affairs existed in T. & P. Ry. Co. v. Scott, 86 S. W. 1065, and in both cases this evidence was held inadmissible as rank hearsay. And as the court said in the Birdwell case, when expressing its doubts as to the correctness of the ruling in the Williams case, "The admission of such evidence against a common carrier in such a case would place it at the mercy of the shipper and his broker to whom the cattle are consigned for sale." The shipper being free to select his own broker, such books are under certain limitations admissible between them, but "we are unable to perceive upon what principle they can be admitted against a common carrier in a suit wherein it is charged with negligence in handling and transporting the goods consigned." We believe the views of the Fourth Court of Civil Appeals are undoubtedly correct, for unless the party who made the entries and saw the cattle weighed would testify to the correctness of the weights, it would appear to be unquestionably hearsay.

§ 8. Baldwin v. White, 26 S. W. 455.

Where one of three defendants against whom a joint judgment in the Justice Court has been rendered, desires to appeal he must not only make bond payable to the plaintiff in judgment but also to his co-defendants.

CONTRA: *Slayton v. Horsey*, 97 T. 341 (78 S. W. 919).

Under the Statutes, article 1670, providing that in order to appeal from a justice's judgment the party appealing shall give bond payable to the appellee, one of several defendants not adversely interested may appeal without naming his co-defendants obligees in the bond.

NOTE.

The first case is by the Court of Civil Appeals for the Fifth District and never reached the Supreme Court, and cites the case of *Moore v. Jordan*, 65 T. 395, which however does not sustain the principle announced. The second case is by the Supreme Court in answer to certified question from the Court of Civil Appeals of the Fifth District.

In *Martin v. Lapowski*, 33 S. W. 300 (11 C. A. 690); *Ayres v. Smith*, 28 S. W. 835 (C. A.); *Ry. Co. v. Mosty*, 27 S. W. 1057 (8 C. A. 330); *Jackson v. Owen*, 46 S. W. 664 (C. A.); all by the Court of Civil Appeals for the Second District; *Ballard v. Coker*, 49 S. W. 921 (C. A.), by the Court for the Fourth District; *Lewellyn v. Ellis*, 115 S. W. 84 (50 C. A. 453), *Houston T. C. Ry. Co. v. Ivy*, 82 S. W. 195 (36 C. A. 452), *Houston Ry. Co. v. Carroll*, 37 S. W. 875 (14 C. A. 393), all by the Court of Civil Appeals for the First District; *Wandelohr v. Rainey*, 100 S. W. 1155, 100 T. 471, by the Supreme Court; *Jesse French Piano Co. v. Thomas*, 83 S. W. 401 (36 C. A. 78) by the Court of Civil Appeals for the Third District, it is held: One of several joint judgment defendants in an action of debt in justice court, may, when such defendants are not adversely interested, appeal without making his co-defendants obligees in his appeal bond."

Friedman v. Dockery, 34 S. W. 766 (C. A.), by the Court of Civil Appeal for the Fourth District, plaintiff sued F for a diamond and sequestered it in the possession of S who claimed and replevied it. On trial F disclaimed, judgment rendered against S who appealed on bond payable to plaintiff only; Held for that reason the appeal should be dismissed.

Hall Music Co. v. Hall, 120 S. W. 904 by the Court of Civil Appeals for the Second District. Plaintiff sued a music company for a breach of warranty and another defendant from whom plaintiff had purchased the claim. Judgment rendered for plaintiff against the other defendant and in favor of music company. The other defendant appealed making bond payable to plaintiff only. Held, the appeal should be dismissed.

Constantine v. Fresche, 43 S. W. 1045 (C. A.), by the Court of Civil Appeals for the First District, where a landlord obtained a judgment fixing a lien upon certain chattels, and an intervener obtained a judgment foreclosing a mortgage on the same chattels, defendant may appeal from one judgment without appealing from the other.

National Bank v. National Bank, 85 T. 560 (22 S. W. 57), by the Supreme Court; *Wandalohr v. Grayson Co. Bank*, 90 S. W. 180 (C. A.), by the Court of Civil Appeals for the Fifth District; where an appeal bond is not made payable to one of the adverse defendants same can be amended under article 1025. The case of *St. Louis Ry. Co. v. Neal*, 65 S. W. 49 (C. A.) by the Court of Civil Appeals for the Fifth District, seems to hold to the contrary.

Cross v. Moores, 55 S. W. 373 (C. A.) by the Court of Civil Appeals for the First District, "where judgment is rendered in justice court against one of the two defendants sued, the appeal bond need not be made payable to the other defendant." This ruling is not in accord with the principle announced by the Supreme Court in the *Slayton* case for the reason that the interest of the two defendants is adverse; the one appealing wants the judgment set aside, while the one not appealing wants it to stand, and if tried *de novo* on appeal judgment may be rendered against both defendants. Hence one defendant has by appeal nothing to gain and all to lose.

The principle laid down by the Supreme Court and followed by the Courts of Civil Appeals, that one of several defendants against whom judgment has been rendered may appeal by executing bond payable to the plaintiff only, has been applied to appeals from all judgments.

The reason for applying the rule to appeals from courts of record is apparent. For where one of the joint defendants appeal the judgment becomes final as to those defendants not appealing and against whom execution can issue, while as to the defendant appealing the judgment is suspended until tried in the appellate court. Hence in that case there may be two final judgments against different defendants, one by the trial court against the defendants not appealing and one by the appellate court against the defendant appealing.

The same reasoning does not support the rule when applied to appeals from justice courts; for there the trial is *de novo*. As said by Judge Collard in the case of *Friedman v. Dockery*, above cited, "The trial on appeal must have been a trial *de novo*, but it could not be a trial *de novo* as to all the issues without an appeal as to *Friedman* * * * . The trial on appeal from the justice court not only suspends the judgment appealed from, but annuls it, in as much as the whole case must be tried in the appellate court *de novo*." If one

joint defendant can alone prosecute an appeal how can the trial in the appellate court be de novo when the court has not acquired jurisdiction as to the other joint defendants?

Judge Key in the case of *Packenius v. Petri*, 29 S. W. 1095, says:

"Packenius appears to have left the justice court under the delusion that he could appeal from that part of that tribunal's adjudication wherein Petri and wife recovered \$90 against him, without disturbing that part of it fixing Mrs. Schmidt's rights. In this he was mistaken. As articles 1294 and 1337 of the Revised Statutes allow but one final judgment to be rendered, and require cases appealed to the county court to be tried de novo, he could not sever the case in twain,—carry his and Petri's branch of it to the county court, and leave the other branch behind."

Judge Williams, then of the Court of Civil Appeals, in the case of *Constantine v. Fresche* above cited seems to recognize that there is a distinction between a joint and several judgment as regards the question in conflict, for he says:

"Judgments having been rendered in favor of plaintiff, as well as intervener, foreclosing both liens upon the furniture, the defendant has appealed from the judgment in favor of the plaintiff, making his bond payable to him alone, and assigning errors against him only. The appellee has moved to dismiss the appeal, because the appeal bond is not payable also to the intervener. We think the two judgments are distinct and several, and that the defendant had the right to appeal as he has done, from that in favor of plaintiff, without disturbing that in favor of intervener, and that the motion to dismiss should be overruled."

Aside from the other real or apparent conflicts certainly the *Baldwin* and probably the *Cross* case must be considered as overruled.

In view of the difficulty of determining whether there is an adverse interest between the several defendants, it is the safest practice to make the appeal bond payable to all the parties who do not join in the appeal.

§ 9. *Ball v. Bennett*, 52 S. W. 618 (21 C. A. 399).

In garnishment proceedings the garnishee was indebted to one of the co-defendants. The affidavit failed to state against which one of the defendants judgment was entered, or which one the garnishee owed. Held, that these defects invalidated the proceedings.

CONTRA: *Jeffries v. Smith*, 73 S. W. 48 (31 C. A. 582).

An application for a writ of garnishment against a garnishee indebted to one of several defendants against whom the original judgment was rendered, which identifies the original judgment rendered by the same court, is sufficient without specifically averring that judgment was rendered against the person to whom the garnishee is alleged to be indebted.

NOTE.

The first case is by the Court of Appeals for the Fifth District and the second is by the Court of Appeals for the Third District, neither of which ever reached the Supreme Court.

It is difficult to determine which is supported by the weight of authority. However, in the case of *United States F. & G. Co. v. Warnell*, 103 S. W. 690, by the Court of Civil Appeals for the Fourth District, in a case against two garnishees it is held, the affidavit averring "that the garnishment now applied for is not sued out to injure either the defendants or garnishee" was fatally defective, because failing to use language which would include both garnishees.

In the case of *Burge v. Beaumont Carriage Co.*, 105 S. W. 232 (47 C. A. 223), by the Court of Civil Appeals for the Fourth District, in which a writ of error was denied by the Supreme Court, it is held, in an action against two defendants the affidavit in garnishment was not invalid for alleging that the writ was not sued out to injure "either the defendant or garnishee" instead of alleging it was not sued out to injure "either of the defendants or the garnishee."

There are no decisions in this state bearing upon the question in conflict as applied to garnishment proceedings unless it be the two cases last quoted, however, practically the same question has arisen in attachment proceedings and can by analogy be applied to the solution of the question in conflict. The Supreme Court in the case of *Doty v. Moore*, 102 T. 48 (112 S. W. 48), held, in an attachment against several defendants it is not necessary for the affidavit to allege the "defendants or either of them" when it says the writ is not sued out for the purpose of injuring or harassing the defendants. See also the cases of *Kildare Lumber Co. v. Atlanta Bank*, 91 T. 95 (41 S. W. 64); *Sarrazin v. Hotman*, 40 S. W. 629 (16 C. A. 351); *Wels Bros. v. Nichols*, 24 S. W. 952; *Lewis v. Stewart*, 62 T. 352; *Hughes v. Wright*, 100 T. 511 (101 S. W. 789); *Bridges v. Bank of Center*, 105 S. W. 1008 (47 C. A. 454); *Perrill v. Kauffman*, 72 T. 215 (12 S. W. 125).

§ 10. Barrett v. Metcalf, 33 S. W. 758 (12 C. A. 247).

"It may be admitted that the purposes of irrigation is one of natural use, such as thirst of people and cattle, and household purposes, which must absolutely be supplied."

CONTRA: Watkins Land Co. v. Clements, 98 T. 578 (86 S. W. 733, 107 A. S. R. 653, 70 L. R. A. 964).

"The facts in the case in Rhodes v. Whitehead, did not raise the issue of the right to appropriate the water for purpose of irrigation and the statement by Judge Moore as above quoted is dicta." In all countries and under all circumstances water is necessary for the support of human and animal life and to answer the demands of other domestic uses. Therefore the law denominates its use for such purposes as natural, and accords to it preference over the demands of irrigation and manufacturing. Subject to this right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purposes of irrigation, provided such use is reasonable, considering all of the circumstances and conditions under which it is made.

NOTE.

See sec. 183, Rhodes v. Whitehead.

§ 11. Barnes v. White, 53 T. 631.

Under the evidence, applied to the law as heretofore decided by this court, and to the provisions of the Constitution of 1876, the plaintiff did not have lien on the property; and as without the lien the district court did not have jurisdiction of the amount, it being under \$500, the judgment is affirmed.

OVERRULED: Ablowich v. Greenville Natl. Bank, 95 T. 429 (67 S. W. 881).

See Sec. 34, Carter v. Hubbard.

§ 12. Battle v. Cushman, 33 S. W. 1037.

The delivery of a promissory note by the maker to another than the payee, without the knowledge or consent of the surety, releases the surety. And where a note was payable to a bank but in fact the note was *not delivered* to the bank, but delivered to a third party, a surety who did not consent to such delivery was held discharged from liability.

CONTRA: Bull v. Latimer, 80 S. W. 252.

Where a note is made payable for the purpose of being discounted by him, but on his refusal to so discount it, it is discounted by another person, such other person may sue the makers, both principal and surety and recover on the note just as the person to whom the note was made payable might have done had he discounted same.

NOTE.

See sec. 57, Eck. v. Schuermann.

§ 13. Beaumont Lumber Co. v. Ballard, 23 S. W. 920.

Possession of land under the impression that it is a part of the public domain is not adverse to the true owner.

OVERRULED BY: Price v. Eardley, 34 C. A. 60, 77 S. W. 416.

See Sec. 204, Schleicher v. Gatlin.

§ 14. Beissner v. Weeks, 50 S. W. 138 (21 C. A. 14).

Where a person not a payee of a note but having endorsed same before or at the time of delivery to a third person, he becomes an original obligor in the note, and whether he is bound as a surety, or guarantor, or principal, it matters not, he would not be discharged by the failure to protest the note, or to file suit thereon at the first term of court, etc.

CONTRA: (Overruled) Barringer v. Wilson, 81 S. W. 533, 97 T. 583 (80 S. W. 994).

Where endorsements are regular and in the order they would be if the note had passed regularly through the hands of the endorsers, the instrument itself determines the status of such endorsers, and parol evidence is inadmissible to change such status, or to establish that such endorser was an original maker or guarantor, and hence such endorser would be discharged by the failure to protest the note or to file suit thereon at the first term of court, etc.

NOTE.

See sec. 122, *Kennon v. Bailey*.

§ 15. Bemus v. Donnigan, 43 S. W. 1053 (18 C. A. 125).

Where there has been a plea in reconvention, and testimony thereon introduced, a verdict for the plaintiff, and judgment thereon, finally disposes of the matters in issue between the parties.

CONTRA: *Sapp v. Anderson*, 135 S. W. 1068, (C. A.).

See Sec. 133, *Lewis v. Smith*.

§ 16. Bigby v. Brantley, 85 S. W. 311 (38 C. A. 44).

Where a party sued in the District Court to have a writ of mandamus issue against the county school superintendent and school trustees, to compel them to issue and approve warrants or vouchers upon the county treasurer for his salary as a school teacher, where the amount involved is over \$200.00, but less than \$500.00, the court had no jurisdiction, the amount involved being within the exclusive jurisdiction of the County Court.

CONTRA: *Anderson v. Ashe*, 90 S. W. 872 (99 T. 447).

Where a party sought by a suit in the District Court to compel a county auditor by mandamus to officially countersign a warrant for \$225.00, the amount of the claim is not in controversy, but it is sought simply to enforce the performance of a

ministerial act enjoined by law upon the auditor and the District Court had jurisdiction of the suit notwithstanding the amount involved.

NOTE.

The syllabus to the case of *Bigby v. Brantley* as written in the reports is misleading. It simply states "Judgment for plaintiff in an action in the District Court involving an amount between \$200.00 and \$500.00 will be reversed; the County Court, and not the District Court, having jurisdiction."

An examination of the case itself shows that the question was the issuance of a mandamus to compel the issuance and approval of a warrant for a school teacher's salary. The amount of the voucher was only an incident. The Court cited the following cases in support of its opinion, viz: *Dean v. State*, 30 S. W. 1047 (88 T. 290); *Johnson v. Hanscom*, 37 S. W. 601, 38 S. W. 761 (90 T. 321); *Lazarus v. Swafford*, 39 S. W. 389 (15 C. A. 367); *McRimmon & Co. v. Moody & Co.*, 28 S. W. 279 (87 T. 260).

The case of *Dean v. State*, 30 S. W. 1047 (88 T. 290) does not support the decision. On the contrary it holds that the County Court only has power to issue such extraordinary writs when necessary to enforce its own jurisdiction, and that the District Court was the only court that had authority to issue such writs irrespective of amount, when such writs were not sought in aid of the County Court's own jurisdiction. On motion for rehearing, however, the Supreme Court in *Dean v. State* (88 T. 290), 31 S. W. 185, modified the latter part of the above statement. That is, it held, that it was mistaken as to the extent of amended section 16, article 5 of the Constitution, and should not have said that the county court could *only* issue these extraordinary writs in aid of its own jurisdiction. That the true rule was that they could issue such writs if necessary in any suit of which said court had jurisdiction, but that this did not deprive the District Court of its power to issue such writs irrespective of the amount involved. Therefore under any view of this case, it is impossible to see, how it could be cited as authority for the ruling in *Bigby v. Brantley*.

In the case of *State v. Hanscom*, 37 S. W. 601 (90 T. 321), the ruling is as follows: "Under amended Sec. 16, art. 5 of the Constitution, this proceeding (application for mandamus) might properly have been instituted in the County Court." Before the amendment the District Court only had power to issue the writ of mandamus, except when it was necessary to enforce the jurisdiction of some other court. But we are of the opinion that, by virtue of the amend-

ment, the County Court has power to issue the writ in any case where a mere moneyed demand is involved, and the amount of that demand exceeds \$200.00 and does not exceed \$1000.00 exclusive of interest. Our reasons for the conclusion are given in the opinion on the motion for rehearing in the case of *Dean v. State*, 30 S. W. 1047, 31 S. W. 185 (88 T. 296). Thus it will be seen that this cited case does not support *Bigby v. Brantley*.

The case of *Johnson v. Hanscom*, 38 S. W. 761, is in reality the same case of *State v. Hanscom* on motion for rehearing, and the Supreme Court affirms the ruling already made in that case.

The case of *Lazarus v. Swafford* is authority, however, for the decision in *Bigby v. Brantley*. It holds that since the amendment to the Constitution (*supra*) the amount involved is the test and that between \$200.00 and \$500.00 exclusive of interest, the County Court has exclusive jurisdiction. It cites *Dean v. State* and *Johnson v. Hanscom* as authority for this holding. It is not believed that these decisions sustain the decision.

The decision also cites the older case of *Anderson Co. v. Kennedy*, 58 T. 616, decided before the amendment to the Constitution, as authority that the District Courts had jurisdiction to issue extraordinary writs independent of the amount involved, but insists that the law was changed by the Constitutional amendment. It says that its conclusions are strengthened by the decisions in *Erwin v. Blanks*, 60 T. 583 and *Railway Co. v. Rambolt*, 67 T. 654 (4 S. W. 356), holding that the general provisions of Sec. 8 of the Constitution should yield to the more specific ones of Sec. 16. (It will be observed that this was an injunction case, but no difference in principle is seen).

The case of *Moody v. McRimmon*, 28 S. W. 279 (87 T. 260), was also an injunction suit, and is authority for the proposition that the County Court had jurisdiction of the suit because of the amount involved. It, however, is not authority for the proposition that the District Court did not also have jurisdiction irrespective of the amount involved, for the court says: "Since under the Constitution, this suit might properly have been brought in the County Court, it follows that the decision of the District Court is final and that no writ of error lies thereto from this court. Being without jurisdiction, we do not undertake to decide whether the District Court had jurisdiction or not. * * * ." Thus it will be seen that of all the cases cited in *Bigby v. Brantley* only one, viz., *Lazarus v. Swafford* can be said to support it. The others seem more to support the contra case of *Anderson v. Ashe*. This later case cites only the case of *Luckey v. Short*, 20 S. W. 723 (1 C. A. 5). This was a suit in the District Court for a mandamus to compel the County Commissioners Court to act upon the official bond of a county officer,

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and the Court without citing authority says that the amount in controversy does not control the jurisdiction in a suit of this kind.

In the case of *Denman v. Coffee*, 91 S. W. 800 (42 C. A. 78), the court's opinion originally was, that the District Court did not have jurisdiction to issue a writ of mandamus where the amount involved was not within its jurisdiction, but after the original opinion was written the Supreme Court decided the case of *Anderson v. Ashe*, and on motion for rehearing, the court upon authority of that case, changed its original opinion and decided that the District Court did have jurisdiction.

See note to *Anderson Co. v. Kennedy*, 58 T. 616; *King's Conflicting Cases*, Vol. 2, secs. 5, 183, 441.

§ 17. *Blackwell v. Barnett*, 52 Tex. 326.

Where the trustee was proceeding to give notice of the sale in ample time to have perfected the same before the debt became barred, and he had been prevented by injunction, this would stop the running of the statute of limitation during the time the injunction suit was pending.

CONTRA: *Davis v. Andrews*, 88 Tex. 530 (32 S. W. 513).

See Sec. 276, *Williams v. Pouns*.

§ 18. *Black v. Black*, 67 S. W. 928.

Notwithstanding a case is tried before the Court without a jury, questions of fact will not be reviewed on appeal unless called to the attention of the trial court by motion for new trial.

OVERRULED: *Greer v. Featherston*, 69 S. W. 69, 5 C. A. 245.

See Sec. 274, *Wetz v. Wetz*.

§ 19. *Blount v. Bleeker*, 35 S. W. 863 (13 C. A. 227).

An action for breach of warranty in a deed by reason of deficiency in the amount of land conveyed is barred by four years statute and not the two years statute. And where a party under such circumstances sues for damages for a fraudulent

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deceit, he is likewise barred by the four year statute of limitations and not by the two years statute.

CONTRA: *Gordon v. Rhodes*, 116 S. W. 40 (102 T. 300).

An action for damages for deceit is an action for "debt" within the meaning of the statutes, and being a contract in writing is barred by the statute of limitations of two years and not of four years.

NOTE.

The *Gordon* case was decided on certified question from the Court of Civil Appeals for the 6th District. See *Gordon v. Rhodes*, 117 S. W. 1023, where on rehearing that court conforms to the ruling of the Supreme Court above. It will also be noted that the Supreme Court in the *Gordon* case expressly declares that the court in the *Blount* case does not hold that the two years statute did not apply to such cases of deceit. Thus in effect saying that such declaration was dictum.

For earlier discussion of this conflict see *King's Conflicting Cases*, Vol. 2, secs. 16 and 427.

§ 20. *Blum v. Rogers*, 71 T. 668 (9 S. W. 595).

The levy and sale would only affect the community interest in the land, of course with right to partition—such partition upon basis of ownership in the land at its acquisition. The creditor could seize and subject to sale the community interest in the land. This did not include the right to an account between the wife and the community in order to reach improvements upon her part. Owning the land, she owned the improvements upon it.

CONTRA: *Maddox v. Summerlin*, 92 T. 483 (49 S. W. 1033).

See Sec. 200, *Samuelson v. Bridges*.

§ 21. *Blum Land Co. v. Rogers*, 32 S. W. 713, 11 C. A. 184.

One who enters upon the erroneous belief that it is part of the public domain, does not hold adversely to the true owner

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thereof, nor will it be presumed that he holds adversely to all save him who he erroneously supposed was the true owner.

OVERRULED BY: *Price v. Eardley*, 34 C. A. 60, 77 S. W. 416.

See Sec. 204, *Schleicher v. Gatlin*.

§ 22. *Brigance v. Horlock*, 97 S. W. 1060 (44 C. A. 277).

The Election Law of 1903, commonly called the Terrell Election Law, provides that the election Judge shall write his signature upon all ballots and prohibits the counting of ballots not so signed. Held, that this provision is mandatory and applies to local option elections and ballots not so signed by the presiding judge should not be counted.

CONTRA: (Overruled) *Walker v. Moberly*, 103 S. W. 409 (101 T. 28).

NOTE.

See *Arnold v. Anderson*, sec. 6, for full note on subject.

§ 23. *Brown v. Orange County*, 107 S. W. 607 (48 C. A. 470).

Filing stenographer's notes on the last day allowed there for, without presenting them to the appellee's attorney for examination, nor the trial judge for approval, is not in compliance with law, however, the appellee can waive the defect as it is not jurisdictional.

CONTRA: *Belt v. Cetti*, 118 S. W. 241.

The practice of disregarding a statement of facts filed after the end of the term of the court, and not authorized to be made up and filed by an order of the court contained in the record, whether brought to the attention of the court by action of counsel, or discovered by the court from investigation of the case, is too well established by our Supreme Court to justify a doubt as to our duty to disregard the statement of facts.

NOTE.

The *Brown* case was decided by the Court of Civil Appeals for

the first district, and a writ of error denied by the Supreme Court. There were a number of principles of law involved in the opinion other than the question in conflict, and there is no way to determine whether or not the application for writ of error raised that question, or whether the Supreme Court passed upon it.

The Belt case was decided by the Court of Appeals for the second district and adopted the opinion by the Court of Appeals for the fifth district in the case of *Matthews v. Boydstun*, 31 S. W. 814, 28 C. A. 57, in which last case a writ of error was denied by the Supreme Court.

The following authorities support the principle announced in the Belt case. *Raleigh v. Cook*, 60 T. 440; *McGuire v. Newbill*, 58 T. 314; *Railway Company v. McAllister*, 59 T. 349; *Dennis v. Neal*, 71 S. W. 387; *Smith v. Pecos V. & N. W. Ry. Co.*, 43 C. A. 204, 95 S. W. 11; *Cockerill v. Walkup*, 44 C. A. 564, 99 S. W. 443; *Stubbs v. Landa Cotton Oil Co.*, 66 S. W. 213, 28 C. A. 56; *Sisk v. Joyce*, 68 S. W. 50.

From the authorities above cited, the rule appears to be firmly established, that where a statement of facts or stenographer's notes made in lieu thereof, as formerly permitted by law, are not filed in time, a motion by the appellee to strike out the statement of facts is not necessary in order to prevent the court from considering them. On the contrary, it seems to be the policy of the law to absolutely prohibit the Court of Appeals from considering a statement of facts not filed within the time required, unless the appellant brings himself clearly within the rule announced in article 1382 Revised Statutes.

§ 24. *Brown v. Dutton*, 85 S. W. 455 (38 C. A. 294).

We conclude that it is clear from the above authorities that a proceeding under Article 1375, Rev. St. 1895, supra, to set aside a judgment rendered on service of citation by publication in the district or county court, should be tried on the pleadings of the parties in such proceeding, separate from the original case, and that either party may appeal from the judgment in such action or proceeding, and that the method of appeal or practice on such appeal will be controlled by the judgment rendered in such action or proceeding, without reference to the judgment in the original case.

CONTRA: *Wolf v. Sahm*, 120 S. W. 1116.

See Sec. 169, *O'Neil v. Brown*.

§ 25. *Brown v. Lane*, 19 Tex. 205.

A foreclosure of an undivided interest in chattels (slaves) cannot be made without the chattel being levied upon and being present at the time of the sale or in some way being under the control of the officer making sale, and a sale under such circumstances is void.

CONTRA: *Patton and Wellborne v. Collin*, 90 Tex. 120 (37 S. W. 414).

A levy by the officer taking possession under such circumstances is not necessary. It is proper for the protection of the plaintiff that a levy should be made, and the officer would doubtless be liable for any loss occasioned by his failure so to do, but the defendant would suffer no injury by being allowed to retain the goods until sale, and the sale would not be void.

NOTE.

Brown v. Lane cites *Converse v. McKee*, 14 Tex. 20, and *Bryan v. Bridge*, 6 Tex. 137, as sustaining the doctrine announced in said case.

Patton & Wellbone v. Collier, 90 Tex. 119 (37 S. W. 414), was decided by the Supreme Court in answer to a certified question from the Court of Civil Appeals of the Second District and cites no Texas case for the holding, but refers to *Ewing v. Hatfield*, 17 Ind. 513, and *Smith v. Barnes*, 8 Kan. 197, as being the only cases upon the precise point to which they have been referred. *Patton v. Collier* has not been subsequently cited so far as can be ascertained.

But as *Converse v. McKee*, 14 Tex. 20 (see note 58 Am. Dec. 99) and *Bryan v. Bridge*, 6 Tex. 173 cited in *Brown v. Lane*, as well as *Portis v. Parker*, 8 Tex. 25, sustain the doctrine announced in *Brown v. Lane*, they are probably also overruled by *Patton v. Collier*. See sec. 26 where *Brown v. Lane* is overruled upon another point.

§ 26. *Brown v. Lane*, 19 Tex. 208.

Where a sheriff's sale is void and purchaser at such sale is the plaintiff in execution, who paid the price bid, such pur-

chaser, as his title could never mature into a good right, the sale being a nullity, cannot recover from the defendant the price so paid.

CONTRA: G. H. & S. A. Ry. Co. v. Blakeney, 73 Tex. 180. (11 S. W. 174).

It must be conceded that as a general rule one can acquire no right against another by the voluntary payment of the latter's debt, but to this there are exceptions. When a debtor's property is subject to be lawfully sold under judicial process and it is sold in an illegal manner the sale may be held void, yet if the debtor sue to recover the property he can only succeed by proffering to pay the purchase money which has gone to extinguish his debt.

NOTE.

Brown v. Lane cites the older case of Howard v. North, 5 Tex. 290, in which it had been held under similar circumstances, that the purchase money must be returned before a recovery could be had, although, the judicial sale was illegal and void, but attempts to distinguish between the facts of that case and the facts in Brown v. Lane, and in this attempt it lays down certain rules or tests. The first of these tests, to-wit:

"First. The sale must be such as to vest the possession, either actually or constructively in the purchaser." Now concerning this test the court says, "Brown did not get such possession or title to the property as ever could have matured into a good right, the sale being a nullity."

No such restriction or test seems to have been made or required in Howard v. North, 5 Tex. 290, and it is difficult to understand how such a test could in fact be required, because the very point is, whether or not the money paid at a void judicial sale could be recovered. Howard v. North seems to have been followed by the great weight of authority in Texas. See Cline v. Upton, 59 Tex. 28; Elam v. Donald, 58 Tex. 319; Teas v. McDonald, 13 Tex. 357 (65 Am. Dec. 71); Graves v. Hickman, 59 Tex. 383; Stone v. Crawford, 1 Posey, sec. 612; Mayes v. Blanton, 67 Tex. 249 (3 S. W. 41); also G. H. & S. A. Ry. Co. v. Blackeney, 73 Tex. 181 (11 S. W. 174), which in turn is followed by Stephenson v. Marsalles, 33 S. W. 383. See also Fotts v. Ferguson, 77 Tex. 305 (13 S. W. 1038); Halsey v. Jones, 86 Tex. 491 (25 S. W. 697).

It will be noted that *G. H. & S. A. Ry. Co. v. Blakeney* cites *Brown v. Lane* as authority for the proposition that the purchase money may be recovered, without apparently noticing the test required in said case. And all cases following the *Blakeney* case quote Justice Gaines' language and citation of authorities without mentioning this so-called test. It may therefore be fairly concluded that *Brown v. Lane* in so far as test No. 1 is concerned is overruled and that the law is as stated under *G. H. & S. A. Ry. v. Blakeney*, *supra*.

See sec. 25, where *Brown v. Lane* is in conflict upon another point.

§ 27. *Bullock v. Sprowls*, 54 S. W. 657 (C. A.).

Where improvements are made upon separate property of one of the spouses with community funds, such improvement becomes a part of the realty, and belongs to the separate estate. The community cannot assert a claim by reason of such improvement that would affect the title to the land.

CONTRA: *Maddox v. Summerlin*, 92 T. 483 (49 S. W. 1033).

See Sec. 200, *Samuelson v. Bridges*.

§ 28. *Burke v. County of Galveston*, 76 T. 267 (13 S. W. 455).

A county treasurer is liable on his bond for money coming into his hands belonging to the School Fund in a suit by the County or by some one "for the use and benefit of the County."

CONTRA: *Jernigan v. Finley*, 90 T. 205 (38 S. W. 24).

See Sec 209 *Simons v. County of Jackson*.

§ 29. *Bynes v. Sampson*, 74 T. 79 (11 S. W. 1073).

The law of 1848, article 26, limited the service by publication on unknown heirs to suits where their ancestors were parties. The law of 1866 authorized it on heirs whose names and residence were unknown, without regard to the fact whether the ancestor was a party to the suit or not.

DICTUM: Kilmer v. Brown, 67 S. W. 1090 (28 C. A. 420).

Act of March 16, 1848, (Pasch. dig. arts. 25, 26) authorizes citation by publication of parties to a suit at the time of its institution or during the progress thereof on affidavit of non-residence, absence from state, that the defendant is a transient person, or that his residence is unknown; and if, at the institution or during the progress of a suit plaintiff makes affidavit that the names of the heirs of any deceased party are unknown, the clerk is required to issue writ for such heirs, giving the names of their ancestors. Held to warrant the citation by publication of unknown heirs in the first instance, though their ancestors had never themselves been a party to the suit.

NOTE.

The first case is by the Commission of Appeals and the second case is by the Court of Appeals for the First District. The exact question in conflict appears not to have been raised in any other cases. However, the reasoning in the Kilmer case is so logical that it must be regarded as the better authority. Since the act of 1848 has been amended by the act of 1866 as embodied in Revised Statutes of 1879, art. 1236, the question in conflict involving the construction of the act of 1848 may never rise again.

§ 30. Cameron v. Marshall, 65 T. 7.

The claim sued on, and for which judgment was rendered, was only \$127.80. Of this amount the court had no jurisdiction, and should not have rendered a personal judgment after refusing to foreclose the lien.

OVERRULED: Ablowich v. Greenville Natl. Bank, 95 T. 429 (67 S. W. 881).

See Sec. 34, Carter v. Hubbard.

§ 31. Campbell v. Bechsenschutz, 25 S. W. 971.

The justice failed to transmit a transcript of the proceedings on or before the first day of the second term following,

as required by law, but transmitted it during such term. Held, that appellant's failure to apply for mandamus to compel the justice to send up the transcript was not ground for dismissing his appeal.

CRITICISED BY: *Missouri K. & T. Ry. Co. v. Bland*, 119 S. W. 911.

See Sec. 176, *Petty v. Miller*.

§ 32. *Capps v. Deegan*, 50 S. W. 151 (C. A.)

To support the statute of limitation of five years, it is not necessary to show that the taxes for each year were paid during the respective years when they accrued.

CRITICISED: *Hirsch v. Patton*, 108 S. W. 1015 (49 C. A. 365).

We are inclined to think that in order for the payment of taxes to be concurrent with the possession, use, or cultivation under recorded deed such payment must be made for each year with reasonable promptness, either when due and demandable, or within such reasonable time thereafter as is usual and customary in the payment of taxes.

NOTE.

The *Capps* case was by the Court of Appeals for the Fourth District, and limitation was based upon the payment of taxes on Nov. 29th, 1892, for years 1890, 1891 and 1892. The Court of Appeals held the plea was sustained, but the Supreme Court in denying a writ of error, 92 T. 600, uses the following language: "We are not prepared to concur with the Court of Civil Appeals in holding the appellee made out her title to the land in controversy by virtue of the statute of limitation of five years." The *Hirsch* case never reached the Supreme Court but follows the rule announced by that court.

In the case of *Snowden v. Rush*, 76 T. 197 (13 S. W. 189), by the Commissioners of Appeal adopted by the Supreme Court, the following language is used: "It is well settled that the payment of taxes and possession must concur, but we do not understand by this that the taxes must be actually paid during the continuance of the possession." This same case was again tried, 69 T. 593 (6 S. W. 767),

and the court, held, under the five-years statute the payment of taxes must be concurrent in point of time with the possession.

In *Mitchell v. Burdett*, 22 T. 633, and *Winters v. Laird*, 27 T. 618, it is held in substance that the deed, its registration, possession, use, or enjoyment must all continue in connection during the full period of five years.

In the case of *Club L. & C. Co. v. Wall*, 99 T. 591 (91 S. W. 778) (122 Am. St. 666), it is held: "To sustain the defense of limitation by possession and payment of taxes for five years under a deed to land duly registered, the defendant must show payment before suit was brought of the taxes of the last year necessary to complete the bar where it was possible to make such payment before that time." This language of the Supreme Court is wholly at variance with that part of the opinion of the Court of Appeals in the *Hirsch* case which holds that the taxes can be paid in a reasonable time after they are due.

In the case of *Halberton v. Brown*, 31 S. W. 535 (9 C. A. 335), by the Court of Appeals for the Second District, wherein a writ of error was denied by the Supreme Court, it is held: "Where the taxes for a year do not become due and payable until after the period necessary to perfect the title under the five years statute of limitation ends, title becomes perfect under the statute without payment of the taxes for that year."

The following authorities hold that the entire failure to pay taxes for any one year during the period destroys the plea. *Murphy v. Welder*, 58 T. 235; *Sorley v. Matlock*, 79 T. 309 (15 S. W. 261); *Converse v. Ringer*, 24 S. W. 705 (6 C. A. 51); *Taylor v. Brymer*, 42 S. W. 999 (17 C. A. 517); *Hoencke v. Lomax*, 102 T. 487 (119 S. W. 842).

The following authorities hold that where the bar is complete prior to the time that the last year's taxes are due, taxes for that year are not required to be paid. *Club L. & C. Co. v. Wall*, 99 T. 591; *Maraposa L. & C. Co. v. Silliman*, 27 S. W. 773; *Halburt v. Brown*, 31 S. W. 535.

The case of *Thompson v. Wiesman*, 98 T. 170 (82 S. W. 593), holds the fact that other persons are paying taxes upon the same land does not prevent the operation of the bar.

§ 33. *Carlisle v. Sommer*, 61 T. 126.

Where a judgment creditor of the husband sues out a writ of garnishment against effects of the wife in the hands of the garnishee, and the garnishee denies that the effects belong to the husband, and the answer of the garnishee

is controverted by the plaintiff, and on the trial the garnishee is successful, it is error to render judgment against the plaintiff in garnishment in favor of the garnishee for attorney's fees.

CONTRA: *Maury v. McDonald*, 118 S. W. 812.

Where a garnishee is discharged the costs including reasonable compensation to the garnishee shall be taxed against the plaintiff, and "reasonable compensation" includes a reasonable attorney's fee for services rendered to the garnishee in preparing and defending his answer after it has been contested.

NOTE.

Associate Justice Reese of the court of appeals for the first district delivering the opinion of the court in the *Maury* case announces a contrary rule to that stated in the *Carlisle* case, and in commenting upon that case says: "In *Carlisle v. Sommer*, 61 Tex. 124, the answer of the garnishee was contested, and upon a trial of the issues the garnishee was successful. The court says that the trial court erred in rendering, at the time and under the circumstances that it did, a judgment against appellant for attorney's fees. We confess to an inability to understand fully what is here meant. If it supports appellant's contention, it is inconsistent with the later cases of *Johnson & Co. v. Blanks*, 68 T. 496, 4 S. W. 557; *Willis v. Heath*, 75 T. 124, 12 S. W. 971, 16 Am. St. Rep. 876, and other cases. *Eastham Bros. v. Banchette*, 42 Tex. Civ. App. 205, 94 S. W. 441."

There is no way to account for the opinion rendered in the *Carlisle* case except upon the theory that the court held that the garnishee had become an active litigant, and this view is taken of that opinion by Judge Garrett in the *Moursund v. Preiss* case, hereinafter cited.

The following authorities also hold with the *Maury* case, although not mentioned in Judge Reese's opinion: *Mayer v. Templeton*, 53 S. W. 68, by the court of appeals, writ of error refused; *Kelley v. Gibbs*, 84 T. 145, 19 S. W. 380; *Jacobs v. Womack*, 26 S. W. 431; *Curtiss v. Ford*, 78 T. 262, 14 S. W. 614; *Carter v. Bush*, 79 T. 29, 15 S. W. 167; *Berry v. Davis*, 77 T. 191, 13 S. W. 978; *Speak v. Kinsey*, 17 T. 303; *Kothman v. Faseler*, 84 S. W. 390; *Patterson v. Peeton*, 19 C. A. 47 S. W. 732.

All of the above authorities, with the possible exception of the *Maury* case, hold that the successful garnishee is entitled, under the statute, to recover of the plaintiff reasonable attorney's fees, on the

other hand, if the plaintiff recovers judgment against the garnishee, whether his answer be contested or not, he is not entitled to recover attorney's fees.

In the cases of *Reid v. Walsh*, 62 S. W. 940; *Moursund v. Priess*, 84 T. 554, and *Kelley v. Gibbs*, above cited, it is held in effect that were the garnishee assumed the attitude of a voluntary litigant urging defenses for the benefit of the defendant without making him a party, he is not entitled to recover attorney's fees.

The effect of the principle announced in the last three mentioned decisions leaves it in doubt whether a garnishee, who assumes the attitude of a voluntary litigant, can recover his attorney's fees even though he be successful.

The statute, article 253, provides "where the answer is contested the costs shall abide the issue of such contest," and the statute seems to make the garnishee's right to recover attorney's fees depend not upon the character of his answer but upon a successful issue of the contest.

§ 34. *Carter v. Hubbard*, 59 T. 356.

Where a suit is brought in the district court on a debt less in amount than \$500, and to foreclose a lien on land, when it is found that no lien exists, it will be dismissed for want of jurisdiction.

OVERRULED: *Albowich v. Greenville Natl. Bank*, 95 T. 429 (67 S. W. 881).

Where a suit was brought in a district court, in good faith, to enforce a lien on land, the fact that it developed upon the trial that there was no lien did not deprive the court of jurisdiction, but, having once acquired it, by virtue of the nature of the suit, it had authority to administer such relief as the parties were entitled to.

NOTE.

Both the overruled and the overruling cases are by the Supreme Court. *Barnes v. White*, 53 T. 631; *Snyder v. Wiley*, 59 T. 448; *Cameron v. Marshall*, 65 T. 7, all by the Supreme Court, are in accord with the overruled case, and are themselves expressly overruled. The following also hold with the overruled case, and while not named in the overruling opinion must be considered as overruled: *Strange v. Pray*, 34 S. W. 666 (C. A.); *Tian v. Lloyd*, 52

S. W. 983 (21 C. A. 435); *Gulf Ry. Co. v. Winder*, 63 S. W. 1046 (26 C. A. 268); *Story v. Woessner*, 47 S. W. 838; *Robinson v. Garrett*, 54 S. W. 270; *Gerardin v. Dean*, 49 T. 243; *Watson v. Bonner*, 6 T. 243; *Blum v. Strong*, 71 T. 321 (6 S. W. 167); *Dyer v. Dement*, 37 T. 433.

The following are in accord with the overruling case: *Waller v. Liles*, 96 T. 21 (70 S. W. 17); *Western Union Tel. Co. v. Arnold*, 97 T. 365 (77 S. W. 249, 79 S. W. 8); *Nashville C. & St. Ry. Co. v. Grayson Co. Nat. Bank*, 100 T. 17 (93 S. W. 431); *Walker v. Wood*, 89 S. W. 791 (40 C. A. 350); *Bridge v. Carter*, 77 S. W. 246 (33 C. A. 591); *Cammach v. Prather*, 74 S. W. 355.

The decision by Judge Brown in the overruling case is predicated on Sec. 8, art. 5, of the Constitution which gives to the District Court exclusive original jurisdiction for the foreclosure of liens on land, regardless of the amount of the debt which the lien was given to secure, and it is held that when the suit is brought in good faith to foreclose the lien the jurisdiction attaches and still continues for the purpose of rendering judgment for the debt altho it may be determined during the progress of the trial that no lien exists.

This is only following the principle announced in a long line of decisions in this state following *Sherwood v. Douthit*, 6 T. 225, to the effect that where a suit is brought on a debt within the jurisdictional amount, the fact that the plaintiff on the trial may only show himself to be entitled to an amount not within the jurisdiction, will not prevent a judgment being rendered for that amount although it may be below the jurisdictional amount.

For conflict on kindred questions, see *King's Conflicting Cases*, Vol. 1, Sec. 137.

§ 35. Clarendon Land & Investment Co. v. McClelland, 86 T. 179 (23 S. W. 576, 1100).

Whether there is any evidence in the record of a fact sought to be established is a question of law, and the Supreme Court is not bound by the opinion of the Court of Civil Appeals upon the question, but if there is any evidence in the record, then the sufficiency or insufficiency of that evidence is a question of fact and under Amend. Const. Art. 5, Sec. 3-6, the decision of the Courts of Civil Appeals is conclusive and the Supreme Court has no power to review such decision.

CONTRA: *Texas & Pacific Ry. Co. v. Johnson*, 37 S. W. 973 (C. A.).

We do not adhere to the doctrine announced in *Land Co. v. McClelland*, that the question of whether or not there is any evidence in the record is a question of law. We believe it to be a question of fact, and that under the Constitution the decision of the Court of Civil Appeals upon the point is final, just as it is upon the question of sufficiency or insufficiency.

NOTE.

It will be observed that in the *Johnson* case, Justice Hunter dissented and agreed with the doctrine announced by the Supreme Court, and although there has been some discussion, the *Johnson* case does not seem to be authority.

The doctrine announced by the Supreme Court in the *Clarendon Land Co.* case is followed by *Insurance Co. v. Haywood*, 88 T. 315 (30 S. W. 1049, 31 S. W. 507); *Warren v. City of Denison*, 89 T. 557 (36 S. W. 404).

§ 36. *Clark v. Goins*, 23 S. W. 703 (C. A.).

A minor grandchild living with her grandmother is a constituent of the grandmother's family so as to entitle her to continue to use the homestead after the grandmother's death, as against decedent's creditors.

OVERRULED: *Wilkins v. Briggs*, 107 S. W. 135 (48 C. A. 596).

The words "minor children," as used in Rev. St. 1895, arts. 2046, 2049, providing for the setting apart of the homestead and exempt property to the widow, minor children, and unmarried daughters of the deceased, were used in the sense of immediate descendants of the deceased, and therefore did not include a grandchild who lived with the intestate as a member of his family.

NOTE.

The overruled case was decided by the Court of Appeals for the Fifth District, and the overruling case by the Court of Civil Appeals for the Sixth District, neither of which ever reached the Supreme Court. Mr. Justice Hodge in the overruling case speaking of the overruled case says; "we think this case may now be regarded

as having been overruled by *Root v. Robertson*, 93 T. 365." The last case does not mention the overruled case but announces a principle directly contrary to the one therein stated. The conflict grows out of the construction of the words "minor children" used in arts. 2046 and 2049, making provision for setting aside the homestead after the death of the head of the family. One may be a constituent of a family within the meaning of that provision of the Constitution providing that, "the homestead of a family shall be and is hereby protected from forced sale for the payment of debts," at the same time may not be entitled after the death of the head of the family, to have the homestead set apart unless the constituent can be included within the term "minor children." In other words one may be a constituent of a family during the lifetime of the head of the family but not entitled to an allowance after the death of the head of the family. The word "family" as named in the Constitution, exempting from forced sale the homestead during the lifetime of the head, had a much broader meaning than the statutory words "widow and minor children and unmarried daughters remaining with the family," as used in our probate law exempting the homestead from administration, so long as the property was used by them as a homestead.

The following authorities clearly draw the distinction between the exemption as applied to the homestead while the head of the family is living, and the allowance made to the constituents after his death. *Martin v. McAllister*, 94 T. 567 (63 S. W. 624); *Wooley v. Sullivan*, 92 T. 28 (45 S. W. 377, 46 S. W. 629); *Ford v. Simms*, 93 T. 586 (57 S. W. 20); *Ashe v. Yungst*, 65 T. 636; *Shannon v. Gray*, 59 T. 252; *Johnson v. Taylor*, 43 T. 123; *Givens v. Hudson*, 64 T. 473; *Zwernemann v. Von Rosenberg*, 76 T. 525 (13 S. W. 85); *Phillips v. Price*, 34 S. W. 784 (12 C. A. 408); *Childers v. Henderson*, 76 T. 664 (13 S. W. 481); *Simms v. Hixon*, 65 S. W. 36; *Hayworth v. Williams*, 102 T. 308 (116 S. W. 43); *Clements v. Maury*, 110 S. W. 185 (50 C. A. 158); *Glasscock v. Stringer*, 33 S. W. 677.

It is true that prior to the Act of the 30th of March, 1887, grandchildren did not take under the law of descent and distribution, but on that day an Act was passed giving them the right to inherit, but this has been held to not enlarge the homestead allowance so as to include grandchildren who may take by inheritance but cannot take the homestead allowance.

§ 37. *Clark v. Hill*, 67 T. 141 (2 S. W. 356).

In a suit upon a note, the burden of proving the consideration of a note is on the plaintiff, and the fact that he has made

a *prima facie* case by putting the note in evidence, does not shift the burden of proof as to the consideration to the defendant, but the plaintiff retains it throughout the investigation of that fact.

OVERRULED AS DICTUM: Gutta Percha Rubber Mfg. Co. v. City of Cleburne, 102 T. 36 (112 S. W. 1047).

Whatever may be the rule elsewhere, it is settled by the decisions of this court that the burden is on the defendant, claiming failure of consideration to prove that defense, and not on the plaintiff to prove a consideration for the notes.

NOTE.

Both the overruled and the overruling case are by the Supreme Court. The following cases are in accord with the overruling case and hold that the burden of proof is on the defendant claiming failure of consideration, to establish his defense: Drew v. Harrison, 9 T. 279; Tolbert v. McBride, 75 T. 95 (12 S. W. 752); Newton v. Newton, 77 T. 508 (14 S. W. 157); Herman v. Gunter, 83 T. 66 (18 S. W. 426); Insurance v. Wicker, 93 T. 390 (55 S. W. 740); Bank v. McGinty, 69 S. W. 495 (29 C. A. 539); Texas & P. Ry. Co. v. Kleper, 25 S. W. 567; Lott v. Achilles, 27 S. W. 587; G. C. & S. F. Ry. Co. v. Hughes, 31 S. W. 411; Masterson v. Heitmann, 87 S. W. 227 (38 C. A. 476); Caruthers v. Cherry, 16 S. W. 867 (4 W. & W., Sec. 118).

The following, Clymer v. Terry, 109 S. W. 1129, 50 C. A. 300; Franklin v. Smith, 1 U. C. 229, and Soloman v. Huey, 1 U. C. 265, are in accord with the overruled case, and hold that when defendant pleads want of consideration the burden is upon plaintiff to establish the consideration. In Williams v. Balls, 9 T. 61, it is held that, "an unsworn plea unless excepted to will admit proof in its support and does not shift the burden to the plaintiff," which holding carries with it the implication that if the plea is properly verified, the burden is on the plaintiff.

The statute requiring certain defenses to be raised only by sworn plea places the defenses of, *non est factum*, and failure of consideration upon the same plane. Not, however, the decisions for in Drew v. Harrison, 12 T. 282 and Persons v. Frost, 25 T. Sup. 131, it is held, that a plea of *non est factum* not sworn to, is a nullity and evidence in its support is not admissible, while in the case of Insurance Co. v. Wicker, 93 T. 390 (55 S. W. 740) it is held, that plea of failure of consideration not sworn to will admit evidence

In its support if not excepted to. Again in the case of *Fulshear v. Randon*, 18 T. 275, it is held, that when the defendant answers by proper plea he puts plaintiff upon proof of the execution of the instrument declared on, while in the *Gutta Percha* case it is held, that plea of failure of consideration does not place the burden on the plaintiff.

In *Lee v. Hamilton*, 12 T. 417; *Holt v. State*, 20 T. Cr. Ap. 273; it is held, that such a plea not verified is a nullity. This being true, what is the necessity of an exception and how can the failure to except admit proof under it?

Notwithstanding the conflicts, the following principles may be considered as established from the weight of authority. While the burden is upon the plaintiff to establish his cause of action and on the defendant to establish his defense, it never shifts, altho the preponderance of the evidence may vary from side to side. While certain pleas are required by statute to be verified yet evidence under it is admissible in the absence of an exception to the plea. Altho a sworn plea is filed, plaintiff makes a *prima facie* case by introducing the instrument sued on, the burden is on the defendant to overcome the plaintiff's case by proving the truth of his plea.

For conflict on necessity of filing plea of *non est factum* when alteration is alleged see Sec. 266, *Wills v. Moore*.

§ 38. *Clift v. Kaufman & Runge*, 60 T. 64.

The cessation of business on the death of the husband, which he had conducted upon the property used as a business homestead, did not by reason of that event divest it of its exempt qualities because his wife and surviving children did not propose or were not able to carry on the same business, that the husband and father pursued in his life-time for their support.

CONTRA: *Morris v. Morris*, 99 S. W. 872 (45 C. A. 60).

Business property is not a part of the homestead of a widow, it not being used as a place of business by her, and not having been so used since the death of her husband, but having been rented continuously since then.

NOTE.

The first case is by the Supreme Court, while the last case is by the Court of Civil Appeals for the First District and which does not appear to have ever been reviewed by the Supreme Court.

Ordinarily where a conflict exists between a decision by the Supreme Court and one by the Court of Civil Appeals the first will prevail, but in the cases in conflict the one by the Court of Civil Appeals appears to be supported by the weight of authority and the better reason.

The language of the Constitution defining the business homestead as a place which "shall be used to exercise the calling or business of the head of the family" and prohibiting its partition "so long as the survivor may elect to use or occupy it as a homestead" seems to support the rule announced by the Court of Appeals in the Clift case.

In *Evans v. Pace*, 51 S. W. 1094 (21 C. A. 368), where a surviving wife claimed the business homestead it was held, that it was only exempt so long as she used it for pursuing her business therein.

In *Pfeiffer v. McNatt*, 74 T. 640 (12 S. W. 821); *Shryock v. Lattimer*, 57 T. 677; *Wynne v. Hudson*, 66 T. 1 (17 S. W. 110); *Hargadene v. Whitfield*, 71 T. 489 (9 S. W. 475); it is held "the head of the family must have a calling or business to which the property is adapted and reasonably necessary."

In *Hill v. Hill*, 85 T. 103 (19 S. W. 1016), the husband owned a blacksmith shop where he carried on business, the shop was burned down, and in a month thereafter he died, held that the widow was not entitled to have the property set apart to her as a business homestead.

In *White v. Yates*, 85 S. W. 46 (it is held, if the surviving wife "should fail to use the business homestead for business purposes within such time as to indicate that she had abandoned the same, and did not intend to use it for such purposes" then the other heirs would be entitled to have partition.

In *Wolff v. Butler*, 28 S. W. 51 (8 C. A. 472) it is held that intention to occupy a place as a business homestead may be manifested by the same acts that would give notice of residence homestead. What acts are necessary to show an intention to claim the residence homestead are defined in the following cases: *Barnes v. White*, 53 T. 631; *Bodkins v. Juykendall*, 81 T. 183 (16 S. W. 743); *Cameron v. Gebhard*, 85 T. 617 (22 S. W. 1033); *Galligher v. Keeler*, 23 S. W. 296 (4 C. A. 458); *Benter v. Lange*, 29 S. W. 813 (9 C. A. 331); *Davidson v. Jefferson*, 68 S. W. 822; *Fort v. Powell*, 59 T. 322.

In *Willis v. Pounds*, 25 S. W. 715 (6 C. A. 517), in order to secure exemption of business homestead the business must be kept up.

In *King v. Harter*, 70 T. 579 (8 S. W. 308), and *Griffin v. Maxey*, 58 T. 214, in reference to setting aside of the homestead after the death of the husband, it is held there is no distinction between the residence and business homestead.

§ 39. *Clift v. Clift*, 72 T. 144 (10 S. W. 338).

Where in a partition suit between a life tenant and others owning an undivided interest in the fee, and a sale is made for the purpose of effecting a partition, it is proper to allow the life tenant that proportion of the proceeds as her interest bears to the whole land.

QUESTIONED: *Swayne v. Lone Acre Oil Co.*, 98 T. 597 (86 S. W. 740, 69 L. R. A. 986).

The right of the life tenant is to the use, and not to the corpus, of the estate; and where his title is an undivided interest, and not in the whole of the land, and a sale is ordered for partition, his right in the proceeds is not a part proportionate to the undivided interest in which he has the life estate, but to the interest on that part as long as the life estate may continue to exist.

NOTE.

Both of the above cases were decided by the Supreme Court and both opinions delivered by Chief Justice Gaines. It is very evident, that in announcing the rule in the questioned case, to the effect that a life tenant was entitled on sale of the property to that part of the proceeds equal to his undivided interest in the whole, was made without due consideration, as the question was not in issue before the Court. In the questioning case the question came up directly for consideration and the Court then announces the correct rule and is supported by all of the authorities.

In the case of *Tieman v. Baker*, 63 T. 641, not mentioned by the Supreme Court in the *Swayne* case, it is held, that one owning a life estate in a part of the land may have partition, and when necessary to effect partition a sale of the whole tract may be made. The *Clift* case also holds that in order to effect partition, the holder of the life estate may force a sale of the entire property. It is difficult to reconcile this holding with the following statute, article 3623: "When a partition is made between joint owner who holds an estate for a term of years or for life, with others who hold equal or greater estates, such partition shall not be prejudicial to those entitled to the reversion or remainder of such estates."

A forced sale of the entire property without the consent of the remainderman in order to effect partition, is certainly prejudicial to his interest.

§ 40. Clymer v. Terry, 109 S. W. 1129 (50 C. A. 300).

In an action on an indorsement on notes binding defendant to pay them on demand, defendant's verified plea, denying that he executed or authorized the execution of indorsements, was a plea of *non est factum*, and put in issue the execution of the indorsements, placing the burden of proof on plaintiff.

CONTRA: Gutta Percha Mfg. Co. v. City of Cleburne, 102 T. 36 (112 S. W. 1047).

See Sec. 37, Clark v. Hill.

§ 41. Cochran v. Middleton, 13 T. 275.

A new trial ought not to be granted to enable the defendant to plead as defense that the debt sued on was paid by winning at cards, though the playing was not within the prohibition of the statute.

CONTRA: Fred v. Fred, 126 S. W. 900 (C. A.).

See Sec. 178, Polk v. Herndon.

§ 42. Cole v. Grigsby, 89 T. 223 (35 S. W. 680 and 792).

Administration was opened upon the estate of a person to whom patent was issued after his death, and a partition among his children was had but no notice was taken of one of the children and nothing was given her by decree. In a suit by her for the land the defendants plead statute of limitations of three years. Held: That the interest of said child did not pass by decree of partition and the same was neither title nor color of title which would support the plea of three years limitation.

CONTRA: Baldwin v. Root, 90 T. 546 (40 S. W. 3).

See Sec. 258, Vermandi v. Hutchins.

§ 43. *Cotton States Bldg. Co. v. Peightal*, 67 S. W. 524
(28 C. A. 575).

Where usurious interest is paid, but the principal debt is unpaid, penalty for usury can be recovered only on what remains after extinguishment of the debt by application of such paid interest.

CONTRA: *Taylor v. Shelton*, 134 S. W. 302 (C. A.).

Where usurious interest is charged and actually paid and received, and the payment is intentionally appropriated by the parties to the discharge of the usurious interest, the right to the penalty of twice the amount of interest paid, attaches at once, though the principal has not been paid.

NOTE.

The first case is by the Court of Civil Appeals for the Fifth District, while the second case is by the Court of Civil Appeals for the Sixth District, in which a writ of error was denied by the Supreme Court.

Under the law as it existed prior to the amendment of 1907, art. 3106, in order for the penalty to be incurred for collecting or receiving usury, the contract exacting the usurious rate must have been in writing: *Quinlan v. Smye* 50 S. W. 1068 (21 C. A. 156); *Aiken v. Waco State Bank*, 16 S. W. 747. The amendment was passed allowing the penalty to be recovered on either verbal or written contracts.

The Supreme Court in *Rosetti v. Lozano*, 96 T. 57 (70 S. W. 204); approves the rule in the *Taylor* case, and holds: "The right to recover back double the amount of usurious interest paid arises when such payments are intentionally appropriated by the parties to its discharge, and the party paying is not required to discharge the principal debt due before he can enforce such recovery."

In *Stout v. Bank*, 69 T. 384 (8 S. W. 808), also by the Supreme Court, the principle in the *Taylor* case is announced.

The United States Supreme Court in *Barnett v. National Bank*, 98 U. S. 555, construing an act of Congress concerning usury, very similar to ours, holds with the *Rosetti* case to the effect that the penalty can not be urged in defense but can only be recovered in a cross action.

The following more or less bear upon the question in conflict: *American Mut. Assn. v. Daugherty*, 66 S. W. 135 (27 C. A. 436); *International Assn. v. Fortassain*, 23 S. W. 498 (C. A.); *Durman v. Harrison*, 41 S. W. 501 (C. A.); *National Bank v. Ragland*, 51 S. W. 661 (C. A.); *Smith v. White*, 25 S. W. 809 (C. A.); *Wartman v. Empire Loan Co.*, 101 S. W. 501 (45 C. A. 472); *Whitlow v. Culwell*, 40 S. W. 642 (16 C. A. 266); *Matthew v. Interstate B. & L. A.*, 50 S. W. 604 (C. A.); *Roberts v. Coffin*, 63 S. W. 597 (C. A.); *Taylor v. Sturgis*, 68 S. W. 538 (29 C. A. 270); *Clayton v. Ingram*, 107 S. W. 881 (C. A.); *Western B. & T. Co. v. Ogden*, 93 S. W. 1104 (42 C. A. 465); *Alston v. Orr*, 105 S. W. 236 (C. A.).

In view of what is said in the *Taylor* and *Rosetti* cases, the *Cotton* case holding that right to recover the penalty for usury is dependent upon the principal being paid, must be considered as overruled.

From the weight of authority as above cited the following principles appear to be established: The liability to pay the penalty and the right to recover it are purely personal to the parties who receive and pay the usury. In other words one who receives usury is still liable for penalty altho he may have assigned the instrument on which the usurious payments were made; nor will the assignee be liable for the penalty unless he has received usurious interest. The one who pays usurious interest can recover from a party receiving it, notwithstanding the principal remains unpaid; and notwithstanding some third party may have assumed the payment of the original obligation. If he, when sued upon the original obligation, pleads usury merely as defensive matter he defeats the plaintiff's right to recover all interest and any payments of interest will be credited upon the principal. If he desires to recover the penalty when sued upon usurious instruments, then he must do so in an affirmative plea in the nature of a cross action or bring an independent suit. In a cross action or an independent suit for the recovery of the penalty, all persons who sign instruments on which usurious interest has been paid are necessary parties, altho some have paid different amounts and some have paid none. When suit is brought upon an instrument upon which usurious interest has been paid, and defendant by cross action recovers the penalty the same shall be deducted from the principal and plaintiff is entitled to judgment for the balance. Where the instrument has been assigned and although unpaid, the party paying the usurious interest can recover from the party receiving the same the full amount of the penalty. Where a party in the purchase of property assumes a usurious obligation, he can neither plead usury nor recover the penalty.

§ 44. *Couturie v. Crespi*, — T. — (131 S. W. 403).

Under the Act of May 1st, 1899, allowing the extension of time for filing statement of facts when the term of the court continues for more than eight weeks, the order must be entered of record by the court in session at the term at which the judgment was rendered.

CONTRA: *Hamill v. Samuels*, — T. — (133 S. W. 419).

Under the Act of May 1st, 1899, allowing the extension of time for filing statement of facts when the term of the court continues for more than eight weeks, the order must be entered of record by the court in session, but not necessarily during the term at which the trial was held.

NOTE.

Both of the above cases were by the Supreme Court, the second being the latest expression must be considered as overruling the first. Judge Brown in the second case speaking of the question in conflict in the first case says:

"In the case cited before Judge Gaines intimates that this was required by the statute; but the question was not involved in that case, and it is simply a suggestion, which is not to be regarded as controlling."

The act in question (Laws 31st Legis., p. 376), allowed the party appealing thirty days after the adjournment of the term to prepare and file statement of facts and bills of exception and gave the court power "in term time or vacation" on the application of either party for good cause to extend the time, provided the extension would not delay the filing of the transcript in the appellate court within the time provided by law.

The act concludes with the following proviso, the construction of which occasions the conflict, "Provided, if the term of said court may by law continue more than eight weeks, said statement of facts and bills of exception shall be filed within thirty days after final judgment shall be rendered unless the court shall by order entered of record in said cause extended the time for filing such statement and bills of exception."

In the case of *Freeman v. Vetter*, 130 S. W. 190 (C. A.), by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court, it was held, that the order of extension

must be made during the term at which the cause was tried. In this case it was further held that the order of extension must be made before the expiration of the original thirty days extension, both of these rulings are in conflict with the Supreme Court decision in the Hamill case.

In *International Order of Twelve v. Johnson*, 131 S. W. 1195 (C. A.), by the Court of Civil Appeals for the Fourth District, it was again held that the order of extension could not be made after the original thirty days extension had expired, and which is also in conflict with the Hamill case. After learning of the Supreme Court's holding in that case, the Court of Appeals changed its ruling in conformity therewith in an opinion not published. It is but just, however, to call attention to the fact that the Fourth Court of Civil Appeals in the above two cases followed the ruling of the Supreme Court in the Couturie case, the Hamill case had not been at that time decided.

The same court in the case of *Atchison T. & S. F. Ry. Co. v. Cox*, 136 S. W. 569 (C. A.), changed its former ruling and followed the latest enunciation of the Supreme Court in the Hamill case. Afterwards on motion for rehearing the court certified the case to the Supreme Court where the certificate is still pending and will not probably be answered before this work is published.

In the case of *Wilkinson v. Ward*, 135 S. W. 692 (C. A.), the Court of Civil Appeals for the Third District held, that the order of extension need not be entered during the term at which the judgment was rendered, and followed the rule laid down in the Hamill case, but the court further held that the order might be entered in vacation which last holding is in conflict with the Hamill case.

In *International & G. N. Ry. Co. v. Alexander*, 135 S. W. 703 (C. A.), by the Court of Civil Appeals for the First District, held that the order of extension could not be entered in vacation, also following the Hamill case (writ of error denied by Supreme Court).

According to the latest expression of the Supreme Court, the following rules must govern in such cases: *First*: The order of extension can not be made in vacation but must be made in open court in term time. *Second*: It can be made either during the term at which the judgment was rendered or at a subsequent term. *Third*: It can be made during or after the expiration of the thirty days allowed by law. *Fourth*: All provisions of the statute should be liberally construed so as to secure the right of appeal.

§§ 45-47] CONFLICTING CASES.

§ 45. Cox v. Rust, 29 S. W. 808.

Under the Statute of 1846—It is necessary that when a written instrument is proved for record by a witness who did not see the grantor sign same, that he swear “that he signed the same as a witness at the request of the grantor.”

CONTRA: Deen v. Wills, 21 T. 642.

Under the same statute mentioned above, held that it was not essential that the witness should swear “that he signed it as a witness at the request of the grantor” in either of the two cases.

NOTE.

See Sec. 52, Dorn v. Best.

§ 46. Craig v. Cartwright, 65 T. 413.

Where it appears that the possession of a tenant of him in whom is the legal title, and the right of possession of that tenant, are restricted to land which he has enclosed, and it does not appear that his possession extends to any of the land claimed by a defendant under the plea of limitation, such possession on the part of the tenant will not, in any respect, interrupt the running of the statute of limitation in favor of such defendant.

CONTRA: Bowles v. Brice, 66 T. 724 (2 S. W. 729).

See Sec. 182.

§ 47. Cummings v. Kendall County, 26 S. W. 439 (7 C. A. 165).

Under the articles of the statutes providing for the laying out of public roads and highways (old articles 4359 et seq., new articles 4670 et seq.). The general authority given the County Commissioners upon their own motion to lay out public roads, is qualified by the term “as hereinafter prescribed,” and the court can not lay out such roads, without a jury of view, nor can they change the report of the jury and therefore as the

statutes require a written notice of the intention to have a jury of view lay out a road, in the absence of this written notice, the land owner is not a party to the proceedings and hence cannot appeal, therefore a writ of injunction would lie against the County Commissioners to prevent the laying out of the road as changed.

CONTRA: Allen v. Parker County, 57 S. W. 103 (23 C. A. 536).

Under the Constitution and statutes the County Commissioners have full power to lay out roads upon their own motion, and they have discretion in accepting or changing the report of the jury of view. The qualification or limitation in the statute "as hereinafter prescribed" applies alone to the discontinuance or alteration of a road already established. Therefore even though a party has not been served with written notice, if he has notice of the proceedings; he may appeal from the order of the Commissioners and hence cannot by an original suit enjoin the County Commissioners from opening a road.

NOTE.

To the same general effect as Cummings v. Kendall County, is the earlier case by the same court of Vogt v. Bexar County, 23 S. W. 1044 (5 C. A. 272), also McIntire v. Lucker, 77 T. 259 (13 S. W. 1077) decided by the Commission of Appeals and adopted by the Supreme Court.

The Cummings case is cited with approval of its general doctrine by the Court of Criminal Appeals in Dilworth v. States, 36 S. W. 274, 36 Tex. Cr. A. 189). It is also cited with approval in Fayssoux v. Kendall County, 55 S. W. 583, this decision was by the same court, the fourth Court of Civil Appeals, that decided the Cummings case, and it will be noted was not an injunction case but was trespass to try title.

In McCown v. Hille, 73 S. W. 851 (C. A.), an opinion by the Court of Civil Appeals reversing and remanding the cause, the case of Allen v. Parker County is apparently cited with approval, but the court further in the opinion indicates that injunction should have been granted because the court failed to assess the damages to the landowner. This would indicate that the court was of the opinion that injunction would lie, even though the party might have appealed, therefore the case is not strictly in harmony with either of the con-

flicting decisions. The Allen case is again cited with approval by the Court of Criminal Appeals in *Kelly v. State*, 80 S. W. 382 (63 Tex. Cr. A. 23), upon the point, that a written notice was not necessary, if the party had notice of and acquiesced in the proceedings.

In *Howe v. Rose*, 80 S. W. 1018 (35 C. A. 328), the extraordinary writ of mandamus was sought, and following *Allen v. Parker County*, refused the writ upon the same grounds that injunction had been refused in that case, calling attention to the fact that the case of *Huggins v. Hurt*, 56 S. W. 944 (23 C. A. 405), held practically the same doctrine as *Allen v. Parker County*, and that the Supreme Court had refused a writ of error in both of said cases. The Supreme Court also refused a writ of error in *Howe v. Rose*.

It would therefore seem that the greater weight of authority is with the doctrine as laid down in *Allen v. Parker County*, and that *Cummings v. Kendall County*, 26 S. W. 439 (7 C. A. 165); *Vogt v. Bexar County*, 23 S. W. 1044 (5 C. A. 272); and *McIntire v. Lucker*, 77 T. 259 (13 S. W. 1077), are practically overruled.

§ 48. *Davidson v. Sadler*, 57 S. W. — (23 C. A. 600).

Under General Laws 1899, Ch. 155, p. 264, making it unlawful for any person to employ any other than a public weigher or his deputies to weigh cotton and other merchandise, it is intended to do away with private weighing for other persons, where there is a public weigher, except by the owner in person, and applies to all persons who buy and sell the articles specified in the statute.

CONTRA: *Whitfield v. Terrell Compress Co.*, 62 S. W. 116 (26 C. A. 235).

The public weigher statute of 1899—only applies to factors and commission merchants and other person or persons of the same class as factors and commission merchants, and does not apply to, or forbid the weighing of cotton by private parties at the request of the owner.

NOTE.

In the *Whitfield* case a writ of error was refused by the Supreme Court, and the doctrine there announced has been generally followed, see: *Galt v. Holder*, 75 S. W. 568 (32 C. A. 564); *Davis v. McInnis*, 81 S. W. 75 (35 C. A. 594); *Gray v. Eleazer*, 94 S. W. 911 (43 C. A. 417).

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[§§ 49-51]

§ 49. *Davis v. Crawford*, 53 S. W. 384.

In a suit upon a promissory note in the absence of a plea of *non est factum* duly verified, the defendant cannot object to the introduction of the note.

CONTRA: *Ruiz v. Campbell*, 26 S. W. 295 (6 C. A. 714).

An allegation in an answer that a note in suit has been altered does not render verification of the answer necessary, the allegation being, in effect, to charge a forgery.

NOTE.

See Sec. 37, *Clark v. Hill*, where all authorities upon the question in conflict are collated.

§ 50. *Dowell v. Winters*, 20 T. 793.

A motion for new trial ought not to be granted to let in a plea of the statute of limitations.

CONTRA: *Fred v. Fred*, 126 S. W. 900 (C. A.).

See Sec. 178, *Polk v. Herndon*.

§ 51. *Doom v. Taylor*, 79 S. W. 1086 (35 C. A. 251).

The requirement of the statute that, to entitle one in possession of land to hold to the boundaries described in any written memorandum other than a deed under which he claims, such memorandum must be duly registered, applies also to deeds, and hence possession of land by one claiming under a deed does not extend to the boundaries called for in the deed, so long as the same is not recorded.

OVERRULED: *Bringhurst v. Texas Company*, 87 S. W. 898 (39 C. A. 500).

The proviso in article 3344 permits an adverse holder under the ten years statute to claims to the limits of the boundaries defined in any recorded muniment of title under which he

holds, but where the instrument under which he holds is a deed it is not necessary that it be recorded in order for him to claim to the limits therein defined.

NOTE.

The Act of February 5th, 1841, P. D., art. 4624, was as follows:

"Ten years of such peaceable possession and cultivation, use or enjoyment thereof, without any evidence of title, shall give to such naked possessor full property precursive of all other claims, in and to six hundred and forty acres of land, including his, her, or their improvement,—yet the right of the government is not to be barred; and there is saved to the person or persons having the title and cause of action, the duration of disability to sue from nonage, coverture, or insanity."

The above was amended by the Revised Statutes of 1879, and the following two articles substituted.

"Art. 3343. Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not there afterward."

"Art. 3344. The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument."

Both the overruling and overruled cases were rendered by Judge Gill of the Court of Appeals for the First District, and in his usual candid manner in confessing the error says:

"The expressions were not necessary to the decision of those cases, and, as is usual when such is the case, were not the result of mature investigation."

It is useless to speculate as to what purpose was to be subserved or what evil was to be remedied by the Legislature in requiring muniments of title to be recorded and not deeds. How-

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[§ 52]

ever, the courts, with the exception of the two overruled cases, have construed the statute according to its plain terms, and in accordance with the overruling case. See *Craig v. Cartwright*, 65 T. 413; *Word v. Drouthett*, 44 T. 369; *Pearson v. Boyd*, 62 T. 54; *Smith v. Garza*, 15 T. 150; *Moody v. Holcomb*, 26 T. 714; *Melton v. Turner*, 38 T. 81; *Mooring v. Campbell*, 47 T. 37.

§ 52. *Dorn v. Best*, 15 T. 62 (41 Am. Dec. 169-178).

Under the Statute of 1846, which provides "that proof of any instrument of writing for the purpose of being recorded, shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath that he or they saw the grantor, or person executing the instrument, sign the same, or that the grantor or the person who executed such instrument of writing acknowledged in his presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he or they had signed the same as witness at the request of the grantor or person who executed such instrument." Held, that where the witness saw the grantor execute the instrument, that he was not required to further swear that he signed it as a witness at the request of the grantor, but that where the instrument was not executed in the presence of the witness, but acknowledged before him by grantor, it was necessary that he further swear that he signed it as a witness at the request of the grantor.

CONTRA: *Deen v. Wills*, 21 T. 642.

Under the same statute mentioned above, held, that it was not essential that the witness should swear "that he signed it as a witness at the request of the grantor" in *either* of the two cases.

NOTE.

It will be observed that the point of conflict is only when the witness does not see the grantor sign, but it is merely acknowledged by the grantor before him. The case of *Dorn v. Best*, says that it is necessary in such a case that the witness swear that

"he signed as a witness at the request of the grantor," the case of *Deen v. Wills* says it is not necessary in either of the cases that he so swear.

The cases of *Downs v. Porter*, 54 T. 64, and *Jones v. Robbins*, 74 T. 615 (12 S. W. 824), both seem to recognize the distinction in *Dorn v. Best*, but as they were both cases where the witness saw the grantor sign the instrument, the point was not involved, and therefore as pointed out in *Williams v. Cessna*, 95 S. W. 1106 (43 C. A. 315), the rulings on this point are dicta.

Sowers v. Peterson, 59 T. 220, however, follows *Deen v. Wills* squarely and holds that it is not essential in either case that the witness should swear that he was requested to sign by the grantor.

The case of *Cox v. Rust*, 29 S. W. 808 (C. A.), holds that it is necessary for the witness to so swear where he did not see the execution, citing *Dorn v. Best*, *Downs v. Porter*, and *Sowers v. Peterson* (*supra*). *Sowers v. Peterson* is not authority for this decision, but on the contrary is authority for the doctrine announced in *Deen v. Wills*.

In *Williams v. Cessna*, 95 S. W. 1106 (43 C. A. 315), the decisions are admirably reviewed, and Judge Pleasants, writing the opinion, states that were it a question of first impression that he would be inclined to hold that the witness should swear that he subscribed at the request of the grantor in *both* cases, but believing the weight of the authority is against that view, he follows *Deen v. Wills* and *Sowers v. Peterson*, and holds that in *neither* case is it necessary for the witness to swear "that he had signed the same at the request of the grantor."

§ 53. *Dublin Cotton Oil Co .v. Jarrard*, 40 S. W. 531 (C. A.)

It is the duty of the owner of premises in putting and keeping buildings and other structures on land used by him in his legitimate business, to exercise care to make them safe for the use of others, even children, coming thereon without invitation or authority.

OVERRULED: *San Antonio & A. P. Ry. Co. v. Morgan*, 92 T. 98 (46 S. W. 28).

In an action for injury received through dangerous machinery, etc. on defendant's private premises, the existence of a duty of defendant to exercise care depends upon his express or implied invitation to the injured party to enter upon the premises.

NOTE.

The Dublin case went to the Supreme Court (91 T. 289), and was there affirmed, but the court refused to pass upon the question in conflict because the same was not assigned as error, however, the Supreme Court in the case of Stamford Oil Mill Co. v. Barnes, 129 S. W. 356, while not expressly overruling the Dublin case, yet it does so in effect when it says "we think it is clearly in conflict with the principles laid down in Dublin v. Ry., 91 T. 60; Ry. Co. v. Edwards, 90 T. 65."

The following authorities also hold in accord with the overruling case, Joske v. Irvin, 91 T. 574 (44 S. W. 1059); Ft. Worth & Denver Ry. Co. v. Robertson, 16 S. W. 1093.

The following cases are in accord with the Dublin case and must be considered overruled: Gulf C. & S. F. Ry. Co. v. Evansich, 61 T. 3; Railway Co. v. Simpson, 60 T. 103; Texas & P. Ry. Co. v. Brown, 33 S. W. 147 (11 C. A. 503). See King's Conflicting Cases, Vol. 11, Sec. 181 and 465.

The following discuss the question in conflict and hold with the overruling case: Williams v. Gulf, C. & S. F. Ry. Co., 88 S. W. 279 (40 C. A. 21); Dobbins v. Missouri, K. & T. Ry. Co., 91 T. 60 (41 S. W. 62, 38 L. R. A. 573, 66 Am. St. 856); Denison & P. S. Ry. Co. v. Harlan, 87 S. W. 732 (39 C. A. 427); San Antonio & A. P. Ry. Co. v. Skidmore, 65 S. W. 215, 27 C. A. 330); Simonton v. Citizens E. L. & P. Co., 67 S. W. 530 (28 C. A. 317); Gulf C. & S. F. Ry. Co. v. Cunningham, 26 S. W. 474 (7 C. A. 65); Grant v. Hass, 75 S. W. 344 (31 C. A. 691); San Antonio W. Co. v. White, 44 S. W. 181 (C. A.); City of Greenville v. Pitts, 102 T. 3 (132 Am. St. 843, 107 S. W. 51, 14 L. R. A. 979); Isbell v. Haywood L. Co., 105 S. W. 212 (47 C. A. 348).

§ 54. Downs v. Porter, 54 T. 64.

Under the Statute of 1846—It is necessary that when a written instrument is proved for record by a witness who did not see the grantor sign same, that he swear "that he signed the same as a witness at the request of the grantor."

CONTRA: Deen v. Wills, 21 T. 642.

Under the same statute mentioned above, held that it was not essential that the witness should swear "that he signed it as a witness at the request of the grantor" in either of the two cases.

NOTE.

See Sec. 52, Dorn v. Best.

§§ 55, 56] **CONFLICTING CASES.**

§ 55. *Dowell v. McBride*, 18 C. A. 645 (45 S. W. 397).

A physician who has a regular diploma duly recorded is not entitled to recover for medical services, unless he also has a certificate from the Medical Board and has had the same duly recorded.

CONTRA: *Wilson v. Vick*, 93 T. 88 (53 S. W. 576).

A physician who has a diploma from a recognized medical school duly recorded is entitled to practice medicine without obtaining a certificate from the board of medical examiners.

NOTE.

The case of *Kennedy v. Schults*, 5 C. A. 461, 25 S. W. 667, is in accord with the first case, but was decided under the law as it existed prior to the adoption of the Revised Statute of 1895 which omits article 3636, and as the law then existed was correctly decided. But under the law as it now stands a physician may lawfully practice who has a diploma duly recorded although he has no certificate from the medical board. The case of *Carleton v. Sloan*, 55 S. W. 751, holds with the overruled case and must be considered as overruled by *Wilson v. Vick*. The cases of *Peterson v. Seagraves*, 90 T. 394 (60 S. W. 781); *Von Koehring v. Schneider*, 60 S. W. 272 (24 C. A. 470), and *Stone v. State*, 86 S. W. 1031, hold with *Wilson v. Vick*. It is held in the case of *Roach v. Davis*, 54 S. W. 1070, that a note given for medical services rendered by a physician practicing without a certificate, is valid in the hands of an innocent holder. Also see *King's Conflicting Cases*, Vol. 2, Sec. 111.

§ 56. *Eastin v. Texas & Pacific Ry. Co.*, 99 T. 654, 92 S. W. 838.

Plaintiff having charged the railway company incorporated by Act of Congress, jointly with its agent, with refusing, under circumstances constituting duress of plaintiff's property, to ship his cattle by the most direct route to their destination, an application by defendants to remove the cause to the Federal Court on the ground that the company was a Federal corporation, and that no cause of action was alleged against its co-defendant, but that he was fraudulently joined for the purpose of preventing the removal, was properly refused.

OVERRULED BY: *In re Mary Dunn*, 212 U. S. 374. See Sec. 242, *Texas & P. Ry. Co. v. Huber*.

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§ 57. *Eck v. Schuermeyer*, 29 S. W. 241.

The delivery of a promissory note by the maker to another than the payee, without the knowledge or consent of the surety, releases the surety. And where a note was payable to a bank but in fact the note was *not delivered* to the bank, but delivered to a third party, a surety who did not consent to such delivery was held discharged from liability.

CONTRA: *Bull v. Latimer*, 80 S. W. 252.

Where a note is made payable for the purpose of being discounted by him, but on his refusal to so discount it, it is discounted by another person, such other person may sue the makers, both principal and surety and recover on the note just as the person to whom the note was made payable might have done had he discounted same.

NOTE.

The case of *Eck v. Schuermeyer* is directly followed by *Battle v. Cushman*, 33 S. W. 1037, which also cites the only case cited by the *Eck* case, viz. *Bank v. Strang*, 72 Ill. 560.

The argument advanced in the *Eck* case is, that a surety has a right to make his own contract. That he might be willing to sign as surety where the obligation was to be delivered to one party, when he might not be willing to so sign if he knew the obligation would be delivered to a different party.

The *Bull v. Latimer* case, cites many out of state authorities to support its contention, but it cites no Texas authority.

The only place where we have been able to find this conflict noted is in the case of *Carter-Battle Grocer Co. v. Clarke et al.*, 91 S. W. 880—but the court expressly refused to decide the point or to bind itself to either doctrine, on the ground that to do so was not necessary in the decision of the case, and therefore it disposed of the case upon another point.

§ 58. *Engelke v. Schlenker*, 75 T. 559 (12 S W. 999).

Stockholders in a National Bank cannot enjoin the collection of taxes assessed against their capital stock on the ground it is in violation of the State Constitution and the Act of

Congress prohibiting discrimination, when it appears that the stock was not assessed beyond its true value.

OVERRULED as DICTA: *Lively v. Missouri, K. & T. Ry. Co.*, 102 T. 545 (120 S. W. 852).

The fact that the intangible assets of a corporation are not assessed above their full value where other property is assessed at less than its actual value, will not deprive the corporation of the right to enjoin the collection of so much of the tax as was based upon the higher assessment on one character of its property than on the other.

NOTE.

Both the overruling and the overruled cases were decided by the Supreme Court, the first by Judge Henry, the second by Judge Brown.

The case of *Langly v. Smith*, 126 S. W. 660, by Judge Rainey of the Court of Civil Appeals for the Fifth District, recognizes the conflict between the two cases, and follows the opinion in the *Lively* case.

Judge Brown in the overruling case recognizes the right of the tax paying corporation to enjoin the collection of the tax, not upon the ground that it must show that all of its property has been over assessed, but upon the ground that it has been assessed for the full value upon one class of property and less than its full value upon the other class, thereby denying to it the equality of taxation secured by the Constitution which equality necessarily depends upon uniformity of assessment.

The purpose of the statute is that each person shall pay a tax in proportion to the value of his property. And the fact that plaintiff's property is admitted to be assessed at its par value will not deprive him of the constitutional guarantee, if by the undervaluation of other property he is compelled to pay more than his just proportion of the burden of taxation: *Andrews v. County*, 1 Wash. 46, 22 Am. St. 138; *Cummings v. Bank*, 101 U. S. 153; *Weeks v. City*, 10 Wis. 242; *Stanley v. Supervisors*, 121 U. S. 535; *Pelton v. Bank*, 101 U. S. 143; *Lefferts v. Board*, 21 Wis. 688; *People v. Weaver*, 100 U. S. 539; *Railway v. Commissioners*, 39 Pac. 1040; *City v. Insurance Co.*, 53 Ala. 570; *State v. Railway*, 40 Md. 22; *County Supra. v. Railway*, 44 Ill. 229; *Coal Co. v. Stookey*, 122 Ill. 358, 13 N. E. 516; *Railway v. County*, 78 Va. 269.

§ 59. *Exparte Lewis*, 73 S. W. 811 (45 Cr. Ap. 1).

Under Bill of Rights, Sec. 1 and 2 and Constitution art 6. Sec. 2, art. 11, Sec. 5, the Legislature has no authority to authorize the appointment of local officers "such as Mayor and other elective officers" by the Governor, and Commissioners for the city of Galveston are virtually aldermen, and the Legislature has no authority to authorize the Governor to appoint such Commissioners for the city of Galveston, and an ordinance passed by commissioner so appointed is void, and that if such appointments are not forbidden by the Constitution, still there exists a right of local self government, based on history and tradition which precludes the Legislature from making such officers gubernatorial appointees.

CONTRA: *Brown v. City of Galveston*, 75 S. W. 488 (97 T. 1).

There is nothing in the Constitution or bill of rights that forbids the Legislature from making such local officers gubernatorial appointees, and there can be no right of local self government based upon history and tradition. The City Charter of Galveston is therefore not unconstitutional and void, and ordinances made by Commissioners appointed by the Governor under such charter provisions, are not for that reason alone, void.

NOTE.

The scope of this work does not contemplate conflicts of the Court of Criminal Appeals, but where a direct and positive conflict exists between the two highest courts in the State, viz., the Court of Criminal Appeals and the Supreme Court, notice must be taken of such conflict.

It will be observed that both of these decisions are upon the charter of the City of Galveston.

The Court of Criminal Appeals was called upon by a writ of Habeas Corpus to discharge the applicant from custody arising out of a fine for violation of a city ordinance.

The Supreme Court was called upon to determine the question arising out of an application for a writ of injunction sought to prevent the enforcement of an ordinance seeking to impose a license tax upon certain vehicles.

Thus it will be seen that both courts were called upon to pass upon the validity of an ordinance passed by the Board of Commissioners of the City of Galveston, operating under a Charter from the State Legislature which authorized the Governor to appoint a number of these commissioners. The opinion of both courts are very lengthy and elaborate. The Supreme Court's opinion is by the full bench, while Judge Brooks files a very full dissenting opinion in the decision of the Court of Criminal Appeals agreeing with the position subsequently taken by the Supreme Court.

In the case of the Commissioners Court of Nolan County v. Beall, 81 S. W. 526 (98 T. 104), the Supreme Court again remarked upon the conflict, but took occasion to state that neither court had authority to settle the conflict, and that when a cause came before it would follow its own decision and supposed the Court of Criminal Appeals would do the same. The supposition was well founded for in *Ex parte Anderson*, 81 S. W. 973, decided the same week by the Court of Criminal Appeals, that court took occasion to restate its opinion in the *Lewis* case. It will be noted, however, that Judge Henderson who wrote the opinion in the *Lewis* case, while concurring with Judge Davidson in the disposition of the *Anderson* case, expressly refused to express his opinion upon the Commissioners (of the City of Corsicana), Judge Brooks again dissents.

Again this Court was called to pass upon the question arising under the Charter of the City of Corsicana and in *Ex parte Lewis*, 81 S. W. 1206, Justice Henderson writing the opinion again announced his adherence to the doctrine of the *Lewis* case, but distinguished between the Galveston charter and the Corsicana charter, holding part of the Corsicana charter legal and part unconstitutional and illegal. Justice Brooks joined in the result of the case, but announced that in his opinion the charter was all legal and constitutional. Davidson, P. J., in this case dissented because he believed the relator should be discharged, because of the partial illegality of the charter, but expressly declined to express any opinion upon the Charter as a whole.

In *Ex parte Tracey*, 93 S. W. 538, Henderson, J., writing the opinion makes a distinction, that is he says that where the officer was appointive originally (such as policemen) the Governor could be authorized by the Legislature to make the appointment instead of the local authorities. Brooks, J., joins in the result, because he says, any of them could be made appointive by the Governor. Davidson, P. J., dissents because he still believes none of them can be appointed by the Governor.

The Supreme Court's opinion in the *Brown* case is cited with approval in *City of Oak Cliff v. State ex rel. Gill*, 77 S. W. 24 (79 S. W.

1 and 1068, 97 T. 383 and 391); *Kettle v. City of Dallas*, 80 S. W. 874 (35 C. A. 632), writ of error refused by Supreme Court; *Callaghan v. Tobin*, 90 S. W. 328 (40 C. A. 441); writ of error refused by Supreme Court. *State v. Larking*, 90 S. W. 912 (41 C. A. 253), writ of error refused by Supreme Court; and *Kissinger v. Hay*, 113 S. W. 1005 (52 C. A. 295).

The decision of the Court of Criminal Appeals in the case of *Solon v. State*, 114 S. W. 349, may possibly show an indication that the Court of Criminal Appeals will ultimately recede from its opinion in the *Lewis* case. The case itself is not upon the direct question, but *Brown v. Galveston*, 97 T. 15 (75 S. W. 488), is cited as authority for the following propositions: (1) That the right to vote is not an inherent right, but is a privilege which is granted or denied by the State on grounds of general policy, and (2) The power of legislation can be restrained only by a prohibition expressed or implied from some provision or provisions of the Constitution."

The personnel of the Court had changed at the time of this decision, being composed of Judges Davidson, Brooks and Ramsey. Judges Brooks and Ramsey join in the decision (and citation) and Judge Davidson dissents.

§ 60. *Fant v. Elsbury*, 68 Tex. 7 (2 S. W. 866).

Every instrument conveying all of a debtor's property for the benefit of all of his creditors, regardless of its form, is a statutory assignment and the attempted preference therein of one creditor over another is void.

CONTRA: *Tittle v. Vanleer*, 89 Tex. 181 (29 S. W. 1065, 34 S. W. 715), (37 L. R. A. 337n).

An instrument conveying all of a debtor's property, though it be for the benefit of all of his creditors, if same provides for a return of the surplus to the grantor and authorizes the trustee to sell and make deeds in the name of the grantors, is a mortgage or deed of trust, and is not an assignment under the statute, and preferences are not void.

NOTE.

Article 71 of the Revised Statutes reads as follows:

"Every assignment made by an insolvent debtor, or in con-

temptation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not, and in every assignment made under this title, whether for the benefit of all creditors, or accepting creditors, any attempted preference of one creditor, or creditors of the assignor shall be deemed fraudulent and without effect."

Justice Neill in *Lochte et al. v. Blum et al.*, 10 C. A. 393 (30 S. W. 929), shows very clearly that in his opinion *Tittle v. VanLeer* practically annuls this statute, and his argument is a logical and scholarly presentation for the principle as announced in *Fant v. Elsbury*, he, however, felt constrained to follow the doctrine as announced by the Supreme Court in *Tittle v. VanLeer*, although he speaks of the latter case as overruling *Fant v. Elsbury*. Mr. Justice Denman, in writing the opinion on the motion for rehearing in *Tittle v. VanLeer*, 34 S. W. 715, denies that *Fant v. Elsbury* is overruled and claims that the particular point was not involved in *Fant v. Elsbury*. This, as heretofore stated, was not Judge Neill's opinion, at any rate, the practical effect is that *Fant v. Elsbury* is overruled.

Judge Denman's opinion on the motion for rehearing is very lengthy and elaborate, and he adheres to the original opinion (also written by Judge Denman).

Tittle v. VanLeer has been followed on this point by

Simon-Gregory Grocery Dry Goods Co. v. Deen, 35 S. W. 308.

Stewart Confectionary Co. v. Ullman, 89 T. 506, 35 S. W. 470, 35 S. W. 1073.

Voorhies v. Waller, 35 S. W. 808.

Willis v. Holland, 36 S. W. 331, 13 C. A. 693.

Rindskopf v. VanLeer, 36 S. W. 918, 14 C. A. 95.

Thaxton v. Smith, 99 T. 596, 40 S. W. 15.

Sullivan v. Thurman, 45 S. W. 394.

Lynch v. Payne, 49 S. W. 406.

Prouty v. Musquiz, 59 S. W. 569.

Peoples v. Slayden-Kirskey Woolen Mills, 90 S. W. 63.

§ 61. *Farmer v. Randel*, 28 S. W. 384 (— C. A. —).

The measure of damages for fraudulent misrepresentations inducing the sale of land is the difference in value between the

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land as represented and as it actually was estimated at the time of the sale.

CONTRA: George v. Hesse, 93 S. W. 107 (— C. A. —).

The measure of damages for fraudulent misrepresentations inducing the sale of land is not the difference between the value of the land as represented and the value of the land as it actually is, but the difference between the value of the land as it actually is and the *value of the consideration given for it*.

NOTE .

The decision in the George case was upon certified question from the Court of Civil Appeals for the Fourth District. That court stating in its certificate that it was unable to agree with the case of Farmer v. Randel. The Supreme Court goes into the matter fully citing many authorities to sustain the doctrine in the George case, which has also been followed in a well considered opinion in Williams v. Detroit Oil & Cotton Co., 114 S. W. 167 (52 C. A. 243).

The last mentioned case was not a land case, but the broad doctrine is laid down, that in any action for fraud or deceit, the measure of damage is not the value of the thing promised, but is the value of the consideration paid less the actual value of the thing delivered. Farmer v. Randel is in effect overruled.

§ 62. Farris v. Gulder, 115 S. W. 645.

In a writ of error from the County Court under the law of 1907 the original statement of facts should not be sent up but should be incorporated in the transcript.

OVERRULED by: Missouri, K. & T. Ry. Co. v. Rogers, 116 S. W. 625.

See Sec. 198, St. Louis Southwestern Ry. Co. V. Nelson.

§ 63. Fort Worth & D. C. Ry. Co. v. Rogers, 80 S. W. 61
(24 C. A. 382).

In a suit by a passenger against a railway company for injuries received in a collision, the following charge was proper:

"While the railroad companies are not to be regarded as insurers of the safety of their passengers, still they are required to use the utmost care to provide for their safety."

CONTRA: *Houston & T. C. Ry. Co. v. Keeling*, 112 S. W. 808 (51 C. A. 386).

In a suit by a passenger against a railway company for personal injuries, it is error for the court to charge the jury that the company owed the passenger the duty of using the utmost care for his safety and protection.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, writ of error denied by the Supreme Court. The second case is by the Court of Civil Appeals for the Sixth District, in which a writ of mandamus was issued by the Supreme Court (102 T. 521, 120 S. W. 847), on account of conflict between that case and the Fort Worth case, but the court in granting the writ does not attempt to settle the conflict. At one time the courts seemed to recognize the rule announced in the Fort Worth case (*King's Conflicting Cases*, Vol. 11, Sec. 306), but the overwhelming weight of authority now is to the contrary. *St. L. Ry. v. Highnote*, 99 T. 23 (86 S. W. 923); *S. A. Ry. Co. v. Lynch*, 55 S. W. 517 (C. A.); *McCarthy v. Houston*, 54 S. W. 421 (21 C. A. 568); *Gulf R. Co. v. Shields*, 28 S. W. 709 (9 C. A. 652); *Gulf Ry. Co. v. Strickland*, 37 S. W. 1093 (C. A.); *Gulf Ry. Co. v. Highby*, 26 S. W. 737 (C. A.); *International Ry. Co. v. Welch*, 86 T. 203 (24 S. W. 854, 24 S. W. 390, 40 Am. St. 829); *Fordyce v. Chancey*, 21 S. W. 181 (2 C. A. 24); *Fordyce v. Withers*, 20 S. W. 766 (1 C. A. 540); *Levy v. Campbell*, 19 S. W. 438 (C. A.); *St. Louis R. Co. v. McCullough*, 45 S. W. 324 (18 C. A. 534); *Garry v. Gulf Ry. Co.*, 42 S. W. 576 (17 C. A. 129); *Gulf Ry. Co. v. Brown*, 40 S. W. 608 (16 C. A. 93); *Texas Ry. Co. v. Orr*, 31 S. W. 696 (C. A.); *Dillingham v. Wood*, 27 S. W. 1074 (8 C. A. 71); *Dallas C. T. R. Co. v. Randolph*, 27 S. W. 925 (8 C. A. 213); *Texas Ry. Co. v. Davidson*, 21 S. W. 68 (3 C. A. 542); *Texas C. R. Co. v. Stewart*, 20 S. W. 962 (1 C. A. 640).

From the foregoing authorities it seems that as an abstract principle of law, railway companies, as carriers, owe to their passengers the highest degree of practicable care in providing for their safety, and this duty not only arises from the contractual relation between the carrier and its passengers, but from the further fact that the means provided by the carrier for their transportation is accom-

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panied by great danger, that can be decreed or diminished according to the degree of care and prudence exercised by the carriers, and the passengers being wholly under the control and supervision of the carriers can take no independent steps for their safety. Yet it would be error for the court in its charge to the jury to give them the abstract proposition of law as above defined.

It would be proper, however, for the trial judge in defining to the jury the degree of care required to say, that while railway companies are not insurers of the safety of their passengers, they must exercise that high degree of care, prudence and foresight reasonably practicable which a prudent man engaged in the business as usually conducted would employ.

§ 64. *Foster v. Martin*, 20 T. 118.

The failure of defendant to file an answer caused by the inadvertence of counsel employed by him, is not sufficient to set aside a judgment by default, to let in the defense of the statute of limitations.

CONTRA: *Fred v. Fred*, 126 S. W. 900 (—C. A. —).

See Sec. 178, *Polk v. Herndon*.

§ 65. *Franklin v. Smith*, 1 U. C. 229.

Where the defendant pleads want of consideration in a note, the burden of proof is upon the plaintiff to satisfy the jury, upon the whole evidence, that the note was supported by a sufficient consideration.

OVERRULED: *Gutta Percha Mfg. Co. v. City of Cleburne*, 102 T. 36 (112 S. W. 1047).

See Sec. 37, *Clark v. Hill*.

§ 66. *Freeman v. Vetter*, 128 S. W. 909 (—C. A. —).

If it should be held that an order extending time for filing statement of facts can only be made during a term of court, it must necessarily be the term at which the cause was tried; for

to construe it otherwise would give courts in cities, the terms of which immediately follow each other, a vast advantage over courts that are held only twice in each year.

CONTRA: Hamill v. Samuels,—T.—(133 S. W. 419).

See Sec. 44, Couturie v. Crespi.

§ 67. Frenkel v. Caddon, 40 S. W. 638.

Where a mother procured letters as guardian of her minor children, on the representation that the proceeds of insurance on their father's life belonged to the estate of the minors; reported it, when collected, as the property of the estate; where the bond of her sureties was given with reference to her representation that the money belonged to her wards, and it was acted on as their property by the court and mother during her guardianship—the sureties, in an action on the bond, cannot say that the money was not the property of the minors.

CONTRA: Koppelman v. Koppelman, 94 T. 40, 57 S. W. 570.

The act of a surviving husband in placing lands on the inventory of property held in community with the deceased wife, on giving bond to administer and account for it as survivor, does not estop him, in a suit by the heirs against him and his bondsmen from showing that it was, in fact, his separate property.

NOTE.

The Frenkel case was decided by the Court of Civil Appeals for the fourth district, from which no writ of error was sued out to the Supreme Court. The Koppelman case was decided by the Supreme Court and in the opinion no reference is made to the Frenkel case, but the conflict between the two cases is noticed in the case of Welsman v. Swain, 114 S. W. 143, decided by the Court of Civil Appeals for the fourth district. It is impossible to reconcile the conflict between the two cases for both decisions are predicated upon practically the same state of facts, and the ultimate rights of the wards in the first case and the rights of the heirs in the second is made to depend on the doctrine of estoppel. It has been held by a long line

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of unbroken authorities in this State that the placing of property upon the inventory by the guardian, administrator, executor or supervisor does not estop them from afterwards showing that the property so inventoried was not in fact the property of the estate. And in order for the estoppel to apply, the act upon which the estoppel is based, must be both fraudulent in its purposes and unjust in its result, and must have been intended to influence and did influence the heir or ward into a line of conduct prejudicial to his interest.

See following authorities upon the question in conflict which hold in accord with the Koppelman case: *Dunham v. Chatman*, 21 T. 248; *White v. Sheppard*, 16 T. 167; *Carrol v. Carrol*, 20 T. 732; *Little v. Birdwell*, 21 T. 607; *Campbell v. Cox*, 1 W. & W. 263; *Ross v. Harbert*, 1 W. & W. 571; *Hailey v. Gatewood*, 74 T. 286, 12 S. W. 25; *Huff v. Maroney*, 23 C. A. 468, 56 S. W. 754; *Johnson v. Morris*, 45 T. 463; *Clapp v. Engledow*, 72 T. 252 (10 S. W. 462).

§ 68. *Gafford v. Foster*, 81 S. W. 63 (36 C. A. 56).

Property held by a husband and wife by adverse possession under an unrecorded tax deed is not acquired, within the statute defining community property, until the limitation period has run; and the wife, having died before that period, acquired no community interest.

CONTRA: *Creamer v. Briscoe*, 101 T. 490 (109 S. W. 911, 130 A. S. R. 869, 17 L. R. A. [N. S.] 154n).

See Sec. 260, *Votaw v. Pettigrew*.

§ 69. *Galveston H. & S. A. Ry. Co. v. Rubio*, 65 S. W. 1126 (— C. A. —).

Where a plaintiff sues a defendant for a breach of defendant's contract to furnish plaintiff medical and hospital attention, for such breach he may recover such damages as might naturally have been expected to have resulted from such breach. And loss of time, decreased capacity to earn a living as well as physical and mental suffering may be considered as elements of damage.

OVERRULED: *Scanlon v. G. H. & S. A. Ry. Co.*, 86 S. W. 930 (— C. A. —).

The measure of damage for breach of a contract of the character mentioned above is the amount it might have reasonably have cost plaintiff to have obtained the same benefits, and any holding in *Railway Company v. Rubio* to the contrary is incorrect.

NOTE.

Both of these opinions are by Chief Justice James of the Court of Civil Appeals of the Fourth Judicial District, neither of which have been reviewed by the Supreme Court.

In the *Rubio* case, Judge James gives no authority for his ruling, but in the *Scanlon* case, he cites, *Illinois Central Ry. Co. v. Gheen*, 112 Ky. 695 (66 S. W. 639, 68 S. W. 1087), as authority for his changed views upon the subject. An examination of the *Gheen* case, shows that the Kentucky court cited no authority for its view upon the matter.

From the standpoint of reason, however, and upon the general rules measuring damages upon breaches of contract, the measure laid down in the *Scanlon* case is the correct one. And Judge James recognized that the damages allowed in the *Rubio* case were too remote and not such as would naturally arise from the breach of such contract.

§ 70. *Galveston H. & S. A. Ry. Co. v. Worth*, 116 S. W. 363
(— C. A. —).

The failure of the jury commissioners to draw jurors for each week of the term, and their failure to designate the week for which they are drawn is not grounds for challenge to the array, for the only ground for such challenge is that the officer swearing the jury has acted corruptly, or wilfully summoned jurors known to be prejudiced.

CONTRA: *White v. State*, 45 Cr. App. 597, 78 S. W. 1066.

Notwithstanding the statute only authorizes a challenge to the array where the officer summoning the jurors acts corruptly or wilfully summons jurors known to be prejudiced, a challenge to the array will be permitted where the trial judge wilfully fails to select jury commissioners for the term, and in consequence of which no jurors have been drawn by the commissioners but special jurors selected in their stead.

NOTE.

The statute, article 3202 and article 3203, the construction of which causes the conflict reads as follows:

"Any party to a suit which is to be tried by a jury may, before the jury is drawn, challenge the array of jurors upon making it to appear that the officer summoning the jury has acted corruptly, and has willfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party."

"No challenge to the array shall be entertained where the jurors have been selected by jury commissioners under the provisions of this title." There is no material difference between the above statute and the code of criminal procedure regulating the selection, summoning and challenging jurors.

The Galveston case was decided by the court of civil appeals for the fourth district, and a writ of error was denied by the Supreme Court and is in accord with the following: Roundtree v. Gilroy, 57 T. 176; G. H. & S. A. Ry. Co. v. Jesse, 2 W. W. 406; G. H. & S. A. Ry. Co. v. Perry, 85 S. W. 64 (38 C. A. 81).

The following cases decided by the court of criminal appeals hold with the White case: Hurt v. State, 51 Cr. App. 338, 101 S. W. 806.

As there is an irreconcilable conflict between two courts of last resort construing the same statute the only practicable solution is for the civil courts to follow the court of civil appeals and the criminal courts to follow the court of criminal appeals.

**§ 71. Galveston H. & S. A. Ry. Co. v. Clemons, 47 S. W. 731
(19 C. A. 452).**

An action against a carrier for failure to deliver goods lost in transit, for which a bill of lading was taken, is within Rev. St. 1895, Art. 3354, providing that actions for conversion of personal property shall be brought within two years, and not article 3356, providing that action for indebtedness founded upon written contracts shall be brought within four years.

CONTRA: Davies v. Texas Central Ry. Co., 133 S. W. 295
(— C. A. —).

A bill of lading is a contract, and an action against a carrier for the breach of this contract to transport and deliver freight, evidenced by a bill of lading signed by the carrier stipulating

for the transportation of freight on terms specified, is an action on "contract in writing" within Rev. Stat. 1895, art. 3356, Sec. 1—declaring that actions for debt founded on any contract in writing may be brought in four years.

NOTE.

In the Clemons case the Court of Civil Appeals for the Fourth District supports its decision by citing the following cases. *Railway Co. v. Roemer*, 20 S. W. 843 (1 C. A. 195); *Martin v. Telegraph Co.*, 26 S. W. 136 (6 C. A. 619).

The Court of Civil Appeals for the Third District analyzes the above decisions and claims they do not support the decision in the Clemons case. They are not directly upon the point but are very persuasive to say the least.

The Davies case cites 25 Cyc. 1033, as fully sustaining its position, as it seems undoubtedly to do. Also the following Texas cases are cited: *Millington v. Ry. Co.*, 2 W. & W. 171; *Robinson v. Varnell*, 16 T. 389; *Trube v. Montgomery*, 27 S. W. 19 (9 C. A. 557); *O'Connor v. Koch*, 29 S. W. 401 (9 C. A. 586).

Millington v. Ry. Co. supports the Davies case, but was expressly overruled in *Ft. Worth & D. C. Ry. Co. v. McAnulty*, 26 S. W. 414 (7 C. A. 321), in so far as same may be said to conflict, but the McAnulty case was not upon the exact point. It was for damages to cattle and not for the failure to deliver. It is, however, difficult to distinguish on principle. Both cases are suits for failure to deliver safely, in the one the goods are lost entirely, in the other they are merely damaged.

Robinson v. Varnell, was a suit on a contract, wherein it was agreed that a slave should be hired and returned at a certain time, the hirer failed to re-deliver the slave at the time agreed, held that the four year and not the two year statute applied.

Trube v. Montgomery, was a suit where a landlord wrongfully ejected a tenant who was holding under a written lease, held that the four year statute applied and not the two year statute (citing *Robinson v. Varnell*).

The case of *O'Connor v. Koch*, was a suit on an improvement certificate issued by the City of Houston, the party to be charged had not signed such certificate, held that it was not a suit for debt evidenced by a contract in writing, and hence was barred in two years. This case does not appear to have any application whatever.

See *Walter A. Wood Mowing Machine Co. v. Hancock*, 23 S. W. 384 (4 C. A. 302), for a kindred question.

§ 72. *Gay v. Hardeman*, 31 T. 245.

When personal property is sold and delivered, the title thereby passes to the purchaser, and an oral agreement that a lien is to be retained by the seller for the purchase money is invalid.

OVERRULED: *Galbraith v. First State Bank & Trust Co.*, 133 S. W. 300 (— C. A. —).

Where personal property is sold and delivered and an oral agreement is made that the seller is to retain a lien thereon for the purchase money, the lien as between the parties is not invalid merely because the agreement was not in writing.

NOTE.

The overruling case was by the Military Supreme Court, while the overruling case is by the Court of Civil Appeals for the Sixth District, a writ of error was denied by the Supreme Court.

In *Lazarus v. Henrietta Natl. Bank*, 72 T. 354 (10 S. W. 253), by the Court of Civil Appeals for the Fifth District, it is said that while a verbal lien might be good as between the parties, yet without possession it would not be good as against subsequent purchasers in good faith.

In *Hastings v. Kellogg*, 36 S. W. 821 (C. A.), and *Harold v. Barwise*, 30 S. W. 498 (10 C. A. 138), both by the Court of Civil Appeals for the Second District, held that a reservation of title in chattels, is but a verbal chattel mortgage and therefore void. Citing with approval the overruled case.

In *Simpkins Equity*, p. 265, it is said, "If the personal property is not delivered, the reservation of title or property must be evidenced by some writing, or it will not be good as chattel mortgage."

The following inferentially support the overruling case: *Perkins v. Frank*, 64 S. W. 236; *Parks v. O'Connor*, 70 T. 385, 8 S. W. 104; *Ry. Co. v. Gentry*, 69 T. 625, 8 S. W. 98; *Harkey v. Cain*, 69 T. 146, 6 S. W. 637; *Gardner v. Bank*, 118 S. W. 1146. Thus it will be seen that whether a verbal lien was valid remained a mooted question in this state until the matter was authoritatively decided by the Supreme Court in *Crews v. Harlan*, 99 T. 93 (87 S. W. 656), which holds: "A verbal reservation of title in personal property to the vendor, at time of sale, to secure the payment of purchase money thereof, though ineffectual to prevent the title from passing constitutes a valid mortgage as between the vendor and vendee."

As a result the Gay, the Lazarus, the Hasting and Harrold cases in so far as they hold a verbal lien invalid, must be considered as overruled.

§ 73. German Insurance Co. v. Everett, 36 S. W. 125.

In a suit on an insurance policy where there is no distinct allegation of ownership of the property destroyed at the time of the fire, a general demurrer to the petition should be sustained, and in the absence of such specific averment of such fact, it cannot be supplied by reasonable intendment.

CONTRA: Northwestern Nat. Ins. Co. v. Woodward, 45 S. W. 185 (18 C. A. 496).

The rules announced in German Ins. Co. v. Everett, that in a suit on an insurance policy, where there is no distinct allegation of ownership of the property destroyed at the time of the fire, a general demurrer to the petition should be sustained, and in the absence of such fact, it cannot be supplied by reasonable intendment, is not correct and should be limited to the cases where special exceptions are interposed pointing out the defects of the petition, where such special exceptions are not interposed, but simply a general demurrer, the court should not sustain such general demurrer, if the averment of ownership at the time of the loss can be supplied by reasonable intendment.

NOTE.

Both of the above decisions are by the Fourth Court of Civil Appeals a full summing up of the cases may be found in Pennsylvania Fire Ins. Co. v. Jameson Bros., 73 S. W. 419 (31 C. A. 651), and the court follows the Woodward case. The Supreme Court denied a writ of error in the Jameson Bros. case, so it is to be presumed that the law is as stated in the Woodward case.

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§ 74. Gerhardt Hardware Co. v. Texas Cotton Press Co., 26 S. W. 168 (— C. A. —).

Where a non-resident garnishee files an answer in the county where he does not reside, he submits himself to the jurisdiction of the court for all purposes, and is not entitled to have the contest of his answer tried in the county of his residence.

LIMITED: American Surety Co. v. Bernstein, 101 T. 189 (105 S. W. 990).

See Sec. 280, Woods Mowing and Reaping Machine Co. v. Edwards.

§ 75. Gillett v. Missouri, K. & T. Ry. Co., 68 S. W. 61.

In a non-jury case a judgment cannot be assailed on account of insufficiency of testimony when no motion for a new trial has been made.

OVERRULED: Greer v. Featherston, 69 S. W. 69, 5 C. A. 245.

See Sec. 274, Wetz v. Wetz.

§ 76. Givens v. Hudson, 64 T. 471.

The homestead is not exempted to the child or widow because it was exempted to the father or husband who was the head of the family, but because the child or widow was and remains a constituent of the family; and when this relation ceases before the death of the intestate there is nothing in reason, nor in the letter or spirit of the law, which can give the exemption to one not sustaining such a family relation.

CONTRA: Zwernemann v. Von Rosenberg, 76 T. 522 (13 S. W. 485).

Where a husband and wife owning a homestead and leaving both minor and adult children surviving, held; that the interest therein belonging to the adults is not subject to sale for

the payment of debts of the decedent so long as a constituent member of the family survives.

NOTE.

The first case is by the Supreme Court Associate Justice Stayton delivering the opinion. The second case is by the Supreme Court Associate Justice Gaines delivering the opinion, wherein Judge Stayton who had then become Chief Justice, delivered a dissenting opinion. There appears to be some doubt as to whether these two cases are in conflict, but in view of the fact that the dissenting opinion of Judge Stayton seems to regard the opinion of the majority as a departure from the rule announced in the Givens case, and from what is said in *Simpkins on Administration*, page 70, the conflict is noted.

The language employed in the Givens case seems to indicate the rule to be that the right of one who takes by inheritance the homestead is wholly dependent upon his status as a constituent member of the family at the time the descent was cast, and the fact that he may have brothers and sisters who are constituent members of the family does not give him, who is not a constituent, the right to take the property discharged of the debt.

The second case lays down the rule that the homestead property passes by descent to all of the heirs alike, altho some of them may not have been constituents of the family at the time the descent was cast. And so long as constituents survive who have the right to the exemption this protects it to the other heirs who are not constituents against the creditors. The rules announced in the last case appear to be supported by *Lacy v. Lockett*, 82 T. 190 (17 S. W. 917); *Scott v. Cunningham*, 60 T. 566; *Hoffman v. Hoffman*, 79 T. 189 (14 S. W. 915, 15 S. W. 471); *Childers v. Henderson*, 76 T. 664 (13 S. W. 482); *Cameron v. Morris*, 83 T. 14 (18 S. W. 423); *Hall v. Fields*, 81 T. 561 (17 S. W. 86); *Roots v. Robertson*, 93 T. 371 (55 S. W. 309); *West v. West*, 29 S. W. 244 (9 C. A. 479); *McAllister v. Goldbole*, 29 S. W. 418; *Stephenson v. Marsalis*, 33 S. W. 385 (11 C. A. 168); *Krueger v. Wolff*, 33 S. W. 668 (12 C. A. 177); *Ford v. Sims*, 93 T. 589 (57 S. W. 20); *Simmons v. Hixon*, 65 S. W. 36.

In addition to the question in conflict it appears to have been uniformly held in the cases above cited that the following rules obtain under the Constitution of 1876: First: That where a constituent of the family survives, the homestead is no part of the estate and not subject to administration. Second: That there is no statutory provision authorizing the setting aside of the homestead

except to the widow, minor children, and unmarried daughters remaining with the family of the deceased. Third: Should there be no widow, minor children or unmarried daughters, then the homestead is liable to administration as a part of the decedent's estate. Fourth: Should there be no constituent of the family surviving, the heirs who sell the homestead property are liable to the decedent's creditor to the extent of what they have received from its sale.

§ 77. *Gracey v. Hendricks*, 93 T. 26 (51 S. W. 846).

Where public school land was classified and put upon the market at \$2.00 per acre, and an applicant made application to purchase same at \$1.50 per acre, and deposited in the land office his obligation and necessary cash payment, the fact that three days thereafter the land was reclassified at \$1.50 per acre gave him no title to the land, even though the rights of a third party had not intervened.

CONTRA: *Hazelwood v. Rogan*, 95 T. 295 (67 S. W. 80).

Since the lands had been awarded to the relator before any superior intervening rights had attached, the award should not have been set aside for the mere irregularity in making the application on the day before the lease had expired, if in fact it had not expired.

NOTE.

Both of the above cases are by the Supreme Court. The first was a premature application to purchase before the land was classified and valued, while the second was a premature application to purchase before prior lease had expired. Associate Justice Hunter of the Court of Civil Appeals for the Second District in the case of *Steward v. Wagley*, 68 S. W. 297 (29 C. A. 105), writ of error denied by the Supreme Court, in speaking of the ruling in the *Gracey* case says:

"The strict and literal interpretation thus given this statute seems, however, to have been, in some respects, at least, materially modified, if not rejected, in the case of *Hazlewood v. Rogan*, above referred to, in which it is held that an application made to purchase school land as additional land by one entitled to purchase additional land, although filed before the land is on

the market, will support an award made after the land is on the market, if such award be made before any superior intervening rights have attached. Such is our understanding of the opinion of the learned chief justice in that case, which, as already seen, accords with the view originally expressed by us in *Hendrix v. Gracey*. It is insisted in the argument of counsel for the motion that the "test adopted (by the supreme court) in the *Gracey* case cannot be harmonized either with the test or the reasoning in the *Hazlewood* case"; and it is difficult for us to see how the application can be treated as absolutely void in the one case, because prematurely filed, and good enough for a valid award in the other, although prematurely filed, but this we leave to the Supreme Court to settle."

The Supreme Court in the case of *Patterson v. Terrell*, 96 T. 509 (74 S. W. 19), held, that an applicant who files his application on the day before the lease expired is entitled to an award when no other rights intervened. It is also held that there is no conflict between the *Gracey* and *Hazlewood* cases.

In *Ford v. Brown*, 96 T. 537 (74 S. W. 535), by the Supreme Court, it is held, an application for purchase of school land filed in the General Land Office forty minutes before the filing of the classification and appraisal with the county clerk had placed the land on the market, was premature and conferred no right as against one filing an application after such filing of the classification and appraisal.

In *McGee v. Corbin*, 96 T. 35 (70 S. W. 79), by the Supreme Court it is held, a lease of school land running for two years from August 26, 1899, must be understood as accepted by the parties in accordance with the settled construction acted on by the Land Office, which included that day within the term, and to have expired at midnight in August 25, 1901.

In *McChristy v. Jackson*, 71 S. W. 569 (C. A.), by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court, it is held, where a lease of public school lands runs for two years "from" August 26, 1899, but the commissioner of the general land office treats it as at an end after midnight, August 25, 1901, by accepting an application to purchase a section included in the lease, his construction will be deemed to enter into the lease, so as to validate the application thus received.

In *Smith v. Zesch*, 70 S. W. 775 (30 C. A. 444), by the Court of Civil Appeals for the Fourth District, it is held: An applicant who files for the purchase of school lands before the expiration of a lease thereof to another, and who is awarded the lands after the expiration of the lease, is entitled thereto as against applicants filing after the award.

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In *Bowerman v. Pope*, 61 S. W. 330, 75 S. W. 1093 (25 C. A. 79), by the Court of Civil Appeals for the Second District, it is held, where school land had been appraised at \$2.00 per acre, an application to purchase at \$1.50 per acre conferred no right to an award, altho the land within seven days thereafter had been re-appraised at \$1.00 per acre.

In *Jones v. Lohman*, 81 S. W. 1002 (36 C. A. 418), where a lease of school land was executed for five years from November 15, 1897, the lease did not expire until midnight of November 15, 1902, the day of the execution of the lease being included in computing the time of its operation, and an application filed on the 15th day of November, 1902, was premature and conferred no title on applicant.

In *McDonald v. Terrell*, 99 T. 107 (87 S. W. 668), by the Supreme Court, it is held, a lease of school land takes effect when the first annual rental is paid, and where this payment was made and a new lease issued after the expiration of a former lease, though upon an application filed by the lessor while his former lease was unexpired, the land was lawfully so relet. The court distinguished this case from that of *Fish Cattle Co. v. Terrell*, 97 T. 490 (80 S. W. 73).

As the Supreme Court has intimated that there is no conflict on the question under discussion the above cases are noted in order that the reader may determine the question for himself.

§ 78. *Gray Ranch Co. v. Pemberton*, 57 S. W. 71 (23 C. A. 418).

Where a non-resident garnishee files an answer in the county wherein he does not reside, he submits himself to the jurisdiction of the court for all purposes, and is not entitled to have the contest of his answer tried in the county of his residence.

LIMITED: *American Surety Co. v. Bernstein*, 101 T. 189 (105 S. W. 990).

See Sec. 280, *Woods Mowing and Reaping Machine Co. v. Edwards*.

§ 79. *Gulf C. & S. F. Ry. Co. v. Fuller*, 63 T. 471.

Under article 1, Sec. 17 of the Constitution, providing "that no person's property shall be taken, damaged or destroyed, for or applied to public use without adequate compensation being

made, unless by the consent of such person, and when taken except for the use of the State, such compensation shall first be made or secured by a deposit of money * * *” the word “property” is used in its legal sense, and means not only the thing used, but every right which accompanies ownership and is its incident, and thus considered, the use of an easement adjoining a person’s property by a railroad, by which the person’s property is “damaged” is also a “taking” within the purview of the Constitution, and compensation must first have been made or secured by a deposit of money.

CONTRA: *Settegast v. Houston, O. L. & M. P. Ry. Co.*, 87 S. W. 197 (38 C. A. 623).

The construction that should be placed upon the case of *Railway Co. v. Fuller* (supra), is that where there is no actual “taking” of property the constitutional provision gives a cause of action for damages, but unless there is an actual “taking,” compensation does not have to be first made or secured.

NOTE.

Judge Gill in the *Settegast* case very accurately and fully analyzes the previous decisions of the superior courts upon the subject and the Supreme Court put its seal of approval upon the doctrine therein announced by refusing a writ of error in the cause.

The *Settegast* case was followed by *Houston, O. L. & M. P. Ry. Co. v. Grossman*, 89 S. W. 312; *Burton Lumber Co. v. Houston*, 101 S. W. 822 (45 C. A. 363), writ of error refused by the Supreme Court, *Hutchison v. Railway Co.*, 111 S. W. 1101; and in *Bigham Bros. v. Port Arthur C. & L. Co.*, 126 S. W. 324.

§ 80. *Gulf C. & S. F. Ry. Co. v. Butcher*, 83 T. 309
(18 S. W. 583).

The right to have an examination made of one who sues for damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice.

OVERRULED as DICTA: *Austin & N. W. Ry. Co. v. Cluck*, 97 F. 172 (77 S. W. 403, 64 L. R. A. 494, 104 A. S. R. 863).

In a civil action for an injury to the person, the court, on application of the defendant has no legal right or power to order the plaintiff, without his or her consent, to submit to a physical examination as to the extent of the injury sued for, but the fact that plaintiff has refused to submit to such examination is admissible in evidence as bearing on the credibility and sufficiency of the testimony on which he seeks to recover.

NOTE.

See Sec. 116, *I. & G. N. v. Underwood*.

§ 81. *Gulf C. & S. F. Ry. Co. v. Norfleet*, 78 T. 321 (14 S. W. 703).

The right to have an examination made of one who sues for damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice.

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NOTE.

See Sec. 116, *I. & G. N. v. Underwood*.

§ 82. *Gulf C. & S. F. Ry. Co. v. Trawick*, 15 S. W. 688, 80 T. 271 (18 S. W. 948, 18 L. R. A. 948, 63 A. S. 560).

Under Art. 4236—Revised Statutes, reading as follows: "Each and every railroad company is hereby required to erect at each and every depot, station or place established by such company for the reception and delivery of freight, suitable buildings or enclosures to protect produce, goods, wares, and merchandise, and freight of every description from damage by exposure to the weather or otherwise," held that the statute requires railroad companies to keep pens for the shipment of cattle, and that they cannot absolve themselves from their statutory duty to keep such as are suitable for the business by showing that they were so badly kept or constructed as to make it contributory negligence upon the part of the shipper to use them.

DOUBTED: *Ft. Worth & R. G. Ry. v. Cage Cattle Co.*, 95 S. W. 704 (— C. A. —).

We approve the decision of Mr. Justice Henry in the case of *Railway v. Trawick*, but we very much doubt whether the language of this article admits of the construction that it requires railway companies to keep suitable pens for the shipment of cattle, on the contrary the terms employed seem to limit the scope of the article to dead freight.

NOTE.

It will be observed that the decision in the *Trawick* case was by the Supreme Court, and the decision is very clear. On motion for rehearing before the same court (18 S. W. 948), that point was the only one on which recovery was allowed—a remittitur on all other damages being filed.

The doubting case is a Court of Appeals decision, and the cause was reversed and remanded. It does not seem to have ever reached the Supreme Court, and no other decision has been found doubting the *Trawick* case. On the contrary in the case of *Houston & T. C. Ry. Co. v. Trammell*, 68 S. W. 716 (28 C. A. 312), it is expressly held citing the *Trawick* case, that the statute does include stock pens. The Supreme Court refused a writ of error in this case.

§ 83. *Gulf C. & S. F. Ry. Co. v. Stokes*, 91 S. W. 328
(— C. A. —).

The Act of the Legislature (see Acts 27th Legislature, p. 283) known as the "Johnson Grass Statute," allowing the owner of lands contiguous to a railroad's right of way, etc., to recover a penalty *and damages* from the railway company, if certain weeds and grasses are allowed to grow, mature and go to seed on the right of way, is unconstitutional and void as to the damages which are allowed in addition to the penalty, because the matter of damages is not included in the title of the Act.

CONTRA: *Doeppenschmidt v. I. & G. N. Ry. Co.*, 101 S. W. 1080 (100 T. 532), 102 S. W. 950 (46 C. A. 577).

The purpose of a "title" to an Act of the Legislature is merely to reasonably apprise the Legislature of the contents of the bill, and it is only necessary to state the general and ultimate object of the bill in its title, and not the details by which the object is to be obtained. The "title" of the statute known as the "Johnson Grass Statute" states the object which is ultimately to be obtained with sufficient clearness and that portion of same allowing damages in addition to penalties is not void or unconstitutional, hence *Railway Company v. Stokes* may be considered overruled.

NOTE.

In *San Antonio & A. P. Ry. Co. v. Burns*, 87 S. W. 1147 (99 T. 154), the Supreme Court intimated that as to the damages, this statute was unconstitutional, although the question not being directly raised, was not passed upon by the Supreme Court. Following this intimation, however, the Court of Civil Appeals of the 3rd Supreme Judicial District, decided the case cited above, to-wit: *Gulf C. & S. F. Ry. Co. v. Stokes*, 91 S. W. 328 (— C. A. —). This decision was followed by *St. L. S. W. Ry. Co. v. Gentry*, 95 S. W. 74 (43 C. A. 299). Then followed the *Doeppenschmidt* case in which the Court of Civil Appeals of the Third Judicial District expressed doubt of the correctness of their decisions in the *Stokes* case upon this point, and certified the question to the Supreme Court, and the

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Supreme Court answering the certified question without referring to their intimation in the Burns case, decided that the statute was constitutional thus inferentially overruling the Stokes and Gentry cases.

This statute has been passed on without this question being directly involved in the following cases: *G. C. & S. F. Ry. Co. v. Henderson*, 86 S. W. 371 (38 C. A. 419); *I. & G. N. Ry. Co. v. Voss*, 109 S. W. 984 (49 C. A. 566); *Doeppenschmidt v. Ry.*, 120 S. W. 929.

N. B.—Since the above was written the constitutionality of the above statute was upheld in *Railway v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 976, and the ruling therein followed by *M., K. & T. Ry. Co. v. Letot*, 135 S. W. 656 (C. A.). (Application for writ of error dismissed by Supreme Court of Texas). See also *M., K. & T. Ry. Co. v. Tolbert*, 134 S. W. 280.

§ 84. *Gulf C. & S. F. Ry. Co. v. Humphries*, 23 S. W. 556
(4 C. A. 335).

In a suit for lost or converted goods, limitation does not begin to run in favor of a carrier until the consignee has notice of the conversion of the goods, or until the usual and reasonable time for the carriage has elapsed.

CONTRA: *Hooks v. Gulf, Beaumont & Kansas City Ry. Co.*, 97 S. W. 516 (— C. A. —).

Where a carrier fails to deliver the goods shipped, the conversion is presumed to have occurred on the day they were received for transportation, and the cause of action accrues on that day and limitation began to run in favor of the carrier from that day.

NOTE.

See Sec. 107, H. & T. C. Railway v. Adams.

§ 85. *Halbert v. Texas T. & L. P. Co.*, 107 S. W. 592.

Article 2899, Revised Statutes, authorizing an action for injuries causing death, resulting from the negligence of agents or servants of a common carrier, does not authorize an action

for wrongful death of a servant of a corporation engaged in the operation of a private tramroad caused by the negligence of a foreman.

OVERRULED BY: *Cunningham v. Neal* 107 S. W. 539. 101 T. 338 (15 L. R. A. [N. S.] 479n). See 109 S. W. 455.

Where a corporation owned and operated a standard gauge railroad track in connection with its factory, renting a locomotive to handle its cars, such tracks constitute a railroad within the statute making a corporation operating a railroad liable for damages sustained by an employee while operating the cars caused by the negligence of a fellow servant.

NOTE.

While it is true that the overruled case was rendered under the Act of 1887, revised statutes, article 2899, and the overruling case was rendered under the Act of 1897, article 4560 f, yet there is no difference between the two statutes in so far as the question in conflict is concerned. The overruled case is based upon the theory that the statute only authorizes actions against persons or corporations engaged in the business of a common carrier, and other characters of corporations are only liable for such injuries when they are the result of the negligent act or omission of the corporation as distinguished from the act or omission of a servant or agent of such corporation, and in support of that position the cases of *Fleming v. Texas Loan Agency*, 28 S. W. 388, and *Ott v. Johnson*, 101 S. W. 538, are cited. The overruling case decided by the Supreme Court proceeds upon the theory that the statute in question does not require that the corporation which operated the railroad shall be organized for that purpose, neither does it require that the operation of the railroad shall be for the purpose of carrying freight and passengers for the public in order to subject the operator to liability, and cite with approval the following cases: *Bammell v. Kirby*, 47 S. W. 393 (19 C. A. 198); *Lodwick Lumber Co. v. Taylor*, 87 S. W. 358 (39 C. A. 302); *Mounce v. Lodwick Lumber Co.*, 91 S. W. 240; *Lodwick Lumber Co. v. Mounce*, 102 S. W. 142 (46 C. A. 230). The last case cited was decided by the Court of Civil Appeals for the Fifth District, holding that a logging road which was operated by a private company was liable for injuries inflicted by the negligence of a fellow servant in the operation of machinery upon the road. That case went to the Supreme Court upon writ of error, which was denied.

The cases of Kirby Lumber Co. v. Owens, 120 S. W. 936, by the Court of Civil Appeals for the Fourth District, and reviewed by the Supreme Court on writ of error (124 S. W. 903), wherein the holding of the Court of Civil Appeals is sustained, and in Cameron v. McSween, 137 S. W. 139, by the Court of Civil Appeals for the First District, review the authorities and hold in accord with the overruling case.

In Farmers & Mechanics Bank v. Hanks, 137 S. W. 1120, by the Supreme Court, it is held, that an elevator operated by a corporation in an office building for the carriage of passengers is not liable for injuries resulting in death within the meaning of the act in question, and further holds, that the mere fact that a corporation may be declared a common carrier does not thereby create liability, unless it be one of the class of persons named in the Statutes. For conflict upon the same question, see Ott v. Johnson, Sec. 171.

§ 86. Hampton v. Gilliland, 56 S. W. 572 (23 C. A. 87).

One in possession of land to which he has no title and holding merely by will of life tenant, cannot claim a homestead right therein. The homestead cannot be based on so precarious a tenure and must await a right to which it can attach in some substantial and permanent way.

CONTRA: Birdwell v. Burleson, 72 S. W. 446 (31 C. A. 31).

Whether the tenancy be for a term of months or years, or simply at will or sufferance, if there be an actual, peaceable, rightful possession of the premises, which would be disturbed by the execution of judicial process, such possession is sufficient to support a homestead exemption.

NOTE.

The Hampton case was by the Court of Appeals for the First District and never reached the Supreme Court. The Birdwell case was by the Court of Appeals for the Third District in which a writ of error was denied by the Supreme Court.

The first case was where tenants at sufferance sought to partition their homestead right in the land among themselves, while in the second case a purchaser under execution sought to recover

against the tenant at sufferance his interest in the property claimed as a homestead. On this ground it is possible the two cases may be distinguished, although the language employed creates an undoubted conflict and the same is so treated in the decision.

The first case appears to be sustained by the following: *Loessin v. Washington*, 57 S. W. 990 (23 C. A. 515); *Roberts v. Trout*, 35 S. W. 323 (13 C. A. 70). While the second case appears to be sustained by *Coates v. Cadwell*, 71 T. 22; *Cullers v. James*, 66 T. 494 (1 S. W. 314); *Luck v. Zapp*, 21 S. W. 418 (1 C. A. 528); and other cases hereinafter cited.

An equitable interest in land sufficient: *Tracy v. Harbin*, 89 S. W. 999 (40 C. A. 395); *Dotson v. Barnett*, 41 S. W. 99 (16 C. A. 258); *Smith v. Chenault*, 48 T. 455; *Silverman v. Landrum*, 56 S. W. 107; *Swearingen v. Bassett*, 65 T. 267; *McGaughey v. American Nat. Bank*, 92 S. W. 1008 (41 C. A. 191).

A homestead may be asserted in a leasehold estate: *Wheatley v. Griffin*, 60 T. 209; *Brewing Assn. v. Smith*, 26 S. W. 94; *Moore v. Greer*, 69 S. W. 201; *Phillips v. Warner*, 16 S. W. 423; *Allen v. Ashburn*, 65 S. W. 45 (27 C. A. 239); *Low v. Tandy*, 70 T. 745 (8 S. W. 620); *McNeil v. Moore*, 27 S. W. 164 (7 C. A. 536); *Moore v. Graham*, 69 S. W. 200 (29 C. A. 235).

Crops while growing upon leased homestead not subject to forced sale: *Alexander v. Holt*, 59 T. 205; *Cunningham v. Coyle*, 2 W. & W., Sec. 422; *Eaves v. Williams*, 31 S. W. 86 (10 C. A. 423).

It appears from the great weight of the Texas authorities that the possession of land by the sufferance or will of the true owner is sufficient upon which the occupant can predicate the homestead exemption, and this claim he can assert against any one attempting to invade his possession, except as against the true owner or some one holding the superior right to the possession.

§ 87. *Harding v. Commissioners*, 65 S. W. 56 (27 C. A. 25).

No citizen is entitled to an injunction to prevent a criminal prosecution, however unfounded such prosecution may be, unless it is made to appear that some property right of his will be interfered with and injury result therefrom, or that he will be harassed with a multiplicity of unfounded prosecutions.

CONTRA: *City of Galveston v. Mistrot*, 104 S. W. 416 (47 C. A. 63).

Equity will not interfere by injunction to restrain the enforcement of a void penal law on the sole ground that it is

necessary to prevent a multiplicity of suits, where no property rights are involved or interfered with by the ordinance and no special grounds other than the mere multiplicity of suits is threatened.

NOTE.

. It will be observed that the only disputed portion of the Harding case is that reading as follows: "Or that he will be harassed with a multiplicity of suits." It is believed that this portion of the opinion in the Harding case is dictum. The Mistrot case analyzes the Harding case, and comes to that conclusion, citing *Wade v. Nunnally*, 46 S. W. 668 (19 C. A. 256), which seems to sustain the doctrine announced. The case of *Sumner v. Crawford*, 41 S. W. 994 (91 T. 132), extends the remedy by injunction very far in Texas, but it is not believed sufficiently to cover the Harding case. This last case has been cited several times, but an examination of each of the cases seems to show that they find property rights involved or put the doctrine upon some other ground besides multiplicity of suits. See *Robinson v. Wingate*, 80 S. W. 1067 (36 C. A. 333); *Harding v. Commissioners Court*, 66 S. W. 45 (95 T. 174), in which the Supreme Court refuses to decide the question: *Norton v. Alexander*, 67 S. W. 788 (28 C. A. 466) (which case doubts the doctrine in the Harding case).

The Mistrot case is followed by *Robinson v. Galveston*, 111 S. W. 1076 (51 C. A. 292); *Kissinger v. Hay*, 113 S. W. 1005 (52 C. A. 295); *Ramon v. Saenz*, 122 S. W. 928 (C. A.).

See also *Greiner-Kelly Drug Co. v. Truett*, 79 S. W. 4 (97 T. 377).

Since the above was written the case of *McDonald v. Denton*, 132 S. W. 823 (C. A.), was decided by the Court of Civil Appeals and the rule announced in the Mistrot case was followed, and the Supreme Court in refusing a writ of error in this case in a written opinion approved the rule in the Mistrot case. (See *Denton v. McDonald*, 135 S. W. 1148 (T.).

§ 88. *Hardy Oil Co. v. Burnham*, 124 S. W. 221.

An unauthorized conveyance by the surviving husband of community property after the death of the wife does not convey title or color of title, and as to such interest the conveyance will not support a defense of limitations of three years.

CONTRA: *Baldwin v. Root*, 90 T. 546 (40 S. W. 3).

See Sec. 258, *Vermandie v. Hutchins*.

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§ 89. *Harrington v. McFarland*, 21 S. W. 116 (1 C. A. 289).

The fact that the city parted with no new consideration for the deed, but accepted it in satisfaction of a pre-existing debt, is not sufficient to charge such city with notice that its execution was procured through fraud.

CONTRA: *Scoggin v. Mason*, 103 S. W. 831 (46 C. A. 480).

See Sec. 265, *Webb v. Burney*.

§ 90. *Hart v. Garcia*, 63 S. W. 921.

The Statute of Frauds is a shield which a party may use or not for his protection, just as he may use a statute of limitations. It is not available to a party unless specifically pleaded, and he cannot for the first time avail himself of it upon appeal.

CONTRA (Limited): *International Harvester Co. v. Campbell*, 96 S. W. 93 (43 C. A. 421).

The case of *Hart v. Garcia* states the rule too broadly to be in perfect harmony with other decisions in this State. It is not necessary that the statute be specifically pleaded, but it is sufficient, if the statute is interposed in some manner. Thus a party could interpose the statute by objecting to the evidence upon the ground that the Statute required that the contract should be in writing. It, however, must be interposed in some manner, and the court below must have had an opportunity to pass upon it, and the Statute cannot be taken advantage of for the first time on appeal.

NOTE.

The authorities are collected in the limiting case, which should be carefully examined.

§ 91. *Hawthorne v. State*, 87 S. W. 839 (39 C. A. 122).

A suit upon a liquor dealer's bond is a suit for penalties, and a judgment for such penalties, is not governed by the Statute

allowing interest upon all judgments recovered in this State, and such judgment bears no interest.

DOUBTED: *White v. Manning*, 102 S. W. 1160 (46 C. A. 298).

The correctness of the ruling in the Hawthorne case is very much doubted, but reluctantly followed.

NOTE.

The first case is by the Court of Civil Appeals for the Third District, and the second case is by the Court of Civil Appeals for the First District, neither of which appears to have been reviewed by the Supreme Court.

The statute in question, art. 3105, is as follows:

"All judgments of the several courts of this state shall bear interest at the rate of six per cent per annum from and after the date of judgment, except where the contract upon which the judgment is founded bears a specified interest greater than six per cent per annum and not exceeding ten per cent per annum, in which case the judgment shall bear the same rate of interest specified in such contract and after the date of such judgment."

In the case of *Baum v. Daniels*, 118 S. W. 754, involving the recovery of the penalty for exacting usurious interest, it is held "no interest can be recovered on penalties in the absence of some statutory provision to that effect. The rule, however, is otherwise after the judgment is rendered. In this state all judgments bear interest from the date of rendition."

§ 92. *Haynie Mercantile Co. v. Miller*, 92 S. W. 262
(41 C. A. 79).

School lands sold to an actual settler are subject to execution against him before he has completed the three years occupancy, for every purchaser of school land has a vendible interest therein from the date of his purchase.

CONTRA: *Williams v. Finley*, 99 T. 468 (90 S. W. 1087).

The State sells the land partly because of the qualifications and status of the purchaser as an actual settler. Because of this it asserts its right to sell and his to buy under such arrangements as that stated. To carry out the policy of the law, the

State has the right to insist upon the maintenance of its contract and of the relation created by it. A judgment such as that rendered below would tend to the destruction of both. By selling out the settler's title at judicial sale and putting the purchaser thereat in possession, it would destroy the occupancy of the settler—the condition on the maintenance of which the title depends—and could not at the same time require the purchaser at judicial sale to perform it.

NOTE.

The conflict between the Haynie case decided by the Court of Civil Appeals for the Second District, and the Williams case by the Supreme Court, is pointed out in the case of *Harwell v. Harbinson*, 95 S. W. 30 (43 C. A. 343), yet that case holds that a mortgage by a purchaser of school land is valid, but can only be enforced after the three years occupancy is complete.

In the case of *Rayner Cattle Co. v. Bedford*, 91 T. 650 (44 S. W. 410; 45 S. W. 554), and *Lamb v. James*, 87 T. 485 (29 S. W. 647) it is held, a contract for the sale of public land to which the vendor has no title is not void, but recovery cannot be had on purchase notes as they are without consideration, and to the same effect is the case of *Beer v. Landman*, 88 T. 450 (31 S. W. 805).

In *Gunnels v. Cartledge*, 64 S. W. 806 (26 C. A. 623), by the Court of Appeals for the Third District, it is held that the original purchaser of state lands which will ripen into title may make a valid contract for the sale of his interest.

The following cases incidentally discuss the question in conflict: *Spence v. Mitchell*, 96 T. 43 (70 S. W. 73); *Johnson v. Bibb*, 75 S. W. 71 (32 C. A. 471); *Reininger v. Pannell*, 101 S. W. 816 (46 C. A. 137); *Denson v. Love*, 58 T. 468; *Sherwood v. Fleming*, 25 T. Sup. 408; *Lee v. Green*, 58 S. W. 847 (24 C. A. 109); *Wood v. Wessen*, 22 S. W. 1069; *State v. Palin*, 25 S. W. 820; *Spence v. Dawson*, 70 S. W. 73; *Bourn v. Robinson*, 107 S. W. 873 (49 C. A. 157); *Slaughter v. Cooper*, 107 S. W. 897; *Martin v. Bryson*, 71 S. W. 615 (31 C. A. 98).

The following principles may now be considered established as a result of the conflict, and from the weight of authorities cited. A purchaser of public school land may sell and convey his interest therein before he has completed his three years occupancy, because the statute authorizes it; and the purchaser gets thereby a good title when he completes the occupancy and carries out the term of the original purchase. But the interest of a purchaser of public school land is not subject to levy and sale under execution before

the completion of the three years occupancy for the reason given in the Williams case. Yet after he has completed the three years occupancy his interest is subject to levy and sale under execution and the purchaser thereby acquires a good title as held in Logue v. Atkeson, 80 S. W. 137 (35 C. A. 308).

§ 93. Hayslip v. Pommeroy, 32 S. W. 124 (7 C. A. 630).

A *certiorari* to perfect the record on appeal will not be granted after the cause has been submitted in the Appellate Court.

CONTRA: Western Union Tel. Co. v. O'Keefe, 87 T. 428 (28 S. W. 945).

The rule that it is too late to apply for a *certiorari* to perfect the record after the cause has been submitted in the Appellate Court, is one calculated to promote the prompt dispatch of business and to preserve regularity of procedure, but it is a rule that has not always been followed and preferably it would be proper to say, "that when a party has evidence that a portion of his record has not been embodied in the transcript sent up, and he discovers this fact after the cause has been dismissed for want of having such portion included, to make his motion to the court suggesting such matter of diminution and supporting it by affidavit or such other evidence as he can procure, pray for a special *certiorari* to the clerk of the court below to send up such matters as may have been omitted, and if satisfied by such affidavit or other evidence, then the court should grant the *certiorari*."

NOTE.

The point of conflict in these two cases has been previously noted in King's Conflicting Cases (see Vol. 2, Secs. 168, 318, 343, 408, 528), and would not again be referred to, were it not that the later cases instead of clearing up the point, make it more confusing.

The Hayslip case cites the older case of Ross v. McGown, et al., 18 T. 603, where the opinion is unqualifiedly expressed that there must be some time or limit beyond which application for a writ of *certiorari* will not be entertained, and that case fixes the rule that

such application will *not* be entertained, after the cause has been submitted in the appellate court. The O'Keefe case practically overrules the Ross case, but does not say so in so many words. Both the Ross case and the O'Keefe case were decided by the Supreme Court. The opinion in the Ross case was cited by Chief Justice Willie, in the O'Keefe case by Chief Justice Gaines. The Ross case was decided in 1883 before the establishment of the Courts of Civil Appeals, and Chief Justice Gaines in a measure bases his opinion in the O'Keefe case upon a Statute expressly applicable to the Court of Civil Appeals, viz., Laws 1892, Sec. 7, page 27, the Court of Civil Appeals have "the power, *upon affidavit or otherwise*, to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction."

The Court of Civil Appeals in the O'Keefe case (29 S. W. 1137) (T.), after the case was submitted, dismissed the appeal because no notice of appeal appeared in the record, the appellant filed his notice to reinstate supported by affidavit that the notice of appeal had in fact been given and prayed for certiorari to perfect the record. The Court of Civil Appeals overruled the motion and refused to grant the writ of certiorari and the Supreme Court granted a writ of error and reversed the cause, directing that certiorari to perfect the record be granted.

In *Missouri Pacific Railway Co. v. Scott*, 78 T. 360 (14 S. W. 791), Chief Justice Stayton writing the opinion, it appeared that the cause had been dismissed for want of a final judgment in the record, thereafter on motion for rehearing a copy of a final judgment was filed together with an *agreement of counsel* that it had been of record in the lower court and could be considered as part of the record in the upper court. The motion for rehearing was refused in the following words "Overruled, Record cannot be perfected after cause dismissed." Chief Justice Gaines in the O'Keefe case refers to this case as well as the Ross case, but nevertheless ordered the certiorari to be granted by the Court of Civil Appeals after the cause had been dismissed by that court although not expressly overruling these cases. Subsequently Chief Justice Gaines in the *Wichita Valley Railway Co. v. W. D. Perry*, 87 T. 597 (30 S. W. 435), reaffirmed the doctrine announced in the O'Keefe case, and gave as additional authority for the ruling the case of *Cavanaugh v. Peterson*, 47 T. 197, stating however, that the case as reported does not give such ruling, but asserts that the records of the office of the Clerk of the Supreme Court shows that such a ruling was made.

After the granting of the writ of error in the O'Keefe case, the Court of Civil Appeals in the same case (29 S. W. 1137), Justice Head writing the opinion, while compelled to obey the Supreme

Court strongly argues for the rule in the Ross case and yields with the utmost reluctance to the ruling of the Supreme Court.

In the case of *Nasworthy v. Draper*, 29 S. W. 557 (9 C. A. 650), on motion for rehearing the Court announced that it would follow the rule of *Ross v. McGown*, and *Railway Co. v. Scott*, and that the "facts in the motion" distinguish the case from *Telegraph Co. v. O'Keefe*, but as it does not give the facts in the motion so it is impossible to see how it so distinguishes the cases. Subsequently the same Court of Civil Appeals in *St. L., I. M. & S. Ry. Co. v. Wills*, 30 S. W. 248, follows the *O'Keefe* case and allows the certiorari after dismissal, but says that its discussion is not intended to conflict with the *Nasworthy* case. The Court then in fact attempts for the first time to make a distinction, it says:

"In the rulings made in this case we are not to be understood as holding that, after a case has been considered and disposed of *on the merits* of appeal, either party can obtain a certiorari to perfect or change the record."

The *O'Keefe* case was again followed in *S. A. & A. P. Ry. Co. v. McDonald*, 31 S. W. 72 (C. A.), in which case the Supreme Court denied a writ of error.

In *G. C. & S. F. Ry. Co. v. Cannon*, 29 S. W. 689 (C. A.), the Court of Civil Appeals had refused a certiorari to perfect the record. On writ of error the Supreme Court, 88 T. 312 (31 S. W. 498), reversed the Court of Civil Appeals and adhered to the doctrine announced in the *O'Keefe* case, announcing through Chief Justice Gaines, that while it is with reluctance that it adopts a rule which may lead to delay and expense still after mature consideration it thinks "that the ends of justice are best promoted by permitting the record to be perfected as well after the judgment is rendered as before it, *provided the attention of counsel has not previously been called to the omission by motion or otherwise.*" Thus in effect overruling the *Ross* case though not expressly so stating.

In *Wichita Valley Ry. Co. v. Perry*, 88 T. 378 (31 S. W. 619), the Supreme Court held that the Court of Appeals had rightly refused a certiorari to perfect the record in a case where the applicant before applying for the writ, had filed a motion in the District Court to amend its minutes, which motion had been refused by the District Court, thus limiting the rule in the *O'Keefe* case, to instances where the hearing was had in the appellate Court, or the motion to amend had been granted by the lower court.

In *Mathews v. Boydston*, 31 S. W. 814 (C. A.), the majority of the Courts of Civil Appeals allowed a certiorari to perfect the record after judgment in the case, Justice Finley dissented, announcing his belief in the old rule announced in the *Ross* case. The Supreme Court, however, refused a writ of error.

The following cases follow the O'Keefe case without particular comment:

Clark v. Burk, 35 S. W. 27 (C. A.).

Gilbough et al. v. Stahl Bldg. Co., 45 S. W. 834 (91 T. 621).

Western Union Tel. Co. v. Gibson, 52 S. W. 631 (C. A.).

Gulf B. & K. C. Ry. Co. v. Easton, 54 S. W. 648 (C. A.).

Smith v. Buffalo Oil Co., 87 S. W. 659 (99 T. 77).

In St. Louis, & S. F. Ry. Co. v. Pettigrew, 97 S. W. 338 (C. A.), the Court while citing the O'Keefe case lays down what in its opinion the application for the writ of certiorari should contain, viz., it should be verified, and should show some *good excuse* for the failure of the record to be complete. This last case is followed in Bonner v. Legg, 101 S. W. 839 (46 C. A. 176); Rice v. Reese, 110 S. W. 502 (C. A.), also follows without comment.

It would seem, therefore, that the Supreme Court after its many decisions on the point had settled the rule as expressed in the Cannon case (ante 31, S. W. 498), to be, "that a record may be corrected as well after a decree as before, *provided attention of counsel has not been previously called to the omissions by motion or otherwise.*"

This language was used in discussing the O'Keefe case as has heretofore been pointed out, yet in Wallace v. Reed Bros., 116 S. W. 36 (102 T. 314), Chief Justice Gaines uses the following language:

"The rule as to the time of filing these motions is settled by decisions of this Court. The motion is in time if filed before the submission of the case. Ross v. McGown, 58 T. 603; Western U. Tel. Co. v. O'Keefe, 87 T. 423 (28 S. W. 945)."

Although the Court does not say so it might be implied that the notice was not in time if filed after the submission.

Another late case on the question is by the Court of Appeals in Sanders et al. v. Eastland Independent School Dist., 126 S. W. 941 (C. A.), and this case returns to the rule as laid down in the Ross case and attempts to distinguish between the Ross case and the O'Keefe case in this, to-wit: "That a dismissal of an appeal for want of jurisdiction does not involve a consideration of the merits of the case. Thus apparently going back to the distinction mentioned in Railway Co. v. Wills, 30 S. W. 248 (ante).

Ross v. McGown, in addition to the Hayslip and other cases mentioned has been followed by the Court of Civil Appeals for the Fourth Supreme Judicial District in Grant v. Hill, 29 S. W. 251 (also 30 S. W. 952) (C. A.), citing, Davis v. Estes, 4 T. Civ. 212 (23 S. W. 411), which last case does not seem to be upon the direct point, also McMickle v. Texarkana Natl. Bank (4 C. A. 212), 23 S. W. 429; Scott v. Cox, 30 Civ. App. 190 (199) (70 S. W. 802), in which a writ of error is refused by the Supreme Court. And in

Houston & T. C. Ry. Co. v. Parker, 126 S. W. 942, the Court, Judge Speer writing the opinion, refused a writ of certiorari after judgment of dismissal for want of jurisdiction by reason of there being no final judgment in the record, citing, *Clark v. Ware*, 125 S. W. 618, and announcing that it would adhere to the *Ross* case strictly, saying that it did not doubt its power to grant the writ, but did not think it advisable so to do in spite of decisions to the contrary. The Supreme Court granted a writ of error in this case which at this time (including 129 S. W.), has not been acted upon. It will thus be seen that the decisions upon this point are hopelessly in conflict, but it is impossible to say whether the case of *Ross v. McGown* is overruled or not.

N. B. Since the foregoing was written, in the case of *Lefevre v. Jackson*, 135 S. W. 212, a case in which a writ of error was denied, it was said: "There is no prescribed time in which an application for certiorari to perfect a record shall be made, and it has been held by the Supreme Court that the ends of justice are best promoted by permitting the record to be perfected even after the judgment has been rendered in an appellate court under proper circumstances, citing the *O'Keefe* case, but in *Houston & T. C. Ry. Co. v. Parker*, 135 S. W. 369 (T.), the Supreme Court after noting this conflict, in order to settle same adopted an amendment to Rule 22 for the Courts of Civil Appeals, which provides" the mere failure to observe omissions or inaccuracies therein will not be admitted after submission, as a reason for correcting the record or obtaining a rehearing." Thus establishing as a rule of Court, practically the rule in *Ross v. McGown*, and setting aside the rule in the *O'Keefe* case.

§ 94. *Heidenheimer v. Loving*, 26 S. W. 99 (6 C. A. 560).

The statute of Texas declaring that all property acquired by either husband or wife during the marriage shall be deemed the common property of both, will control as to real estate situated in Texas, although the parties may both reside in another State, where a different rule of law may apply to such property.

DICTA: *Thayer v. Clarke*, 77 S. W. 1051 (— C. A. —).

Money carrier by a husband from a common law state is presumed to be his separate property and when used in pur-

chasing land in Texas, the land so purchased likewise became his separate property.

NOTE.

Both of the above cases are by the Court of Civil Appeals for the first district, neither of which ever reached the Supreme Court. As to whether there is a conflict between the two cases there is some doubt, however, Judge Gill delivering the opinion in the last case seems to so consider it. If in the last case the court intended to hold that where a husband brings money from a common law state and buys with it lands in Texas, it becomes his separate property upon the presumption that the money was earned in the common law state during the marriage, then there is undoubtedly a conflict, and is not only in conflict with the Heidenheimer case but is in conflict with the decisions of the Supreme Court in the cases of *Blethen v. Bonner*, 93 T. 141, 53 S. W. 1016; and *Oliver v. Robertson*, 41 T. 422.

By statute (arts. 2968 and 2969), and the decisions, all property acquired during the marriage by either the husband or wife is presumed to be community, notwithstanding, they may live in another state at the time and that presumption can only be overcome by proof that the money so used was the separate property of one of the spouses.

In the *Blethen* case by the Supreme Court it is held that when property is purchased in this state with funds brought from another state, there is no presumption that the common law is in force in that state. On the contrary, it must be alleged and proved that the common law was adopted and was in force at the time the money was acquired which was used in the purchase of the land in this state. *Crosby v. Houston*, 1 T. 203; *Bradshaw v. Mayfield*, 18 T. 21; *Porcheler v. Bronson*, 50 T. 555; *Houston, etc., Ry. Co. v. Baker*, 57 T. 422; *Tempel v. Dodge*, 89 T. 68 (32 S. W. 514, 33 S. W. 222).

§ 95. Herndon v. Davenport, 75 Tex. 462 (12 S. W. 1111).

Land belonging to a bankrupt passes to his assignee in bankruptcy for the purposes of that proceeding, whether scheduled or not, but if not disposed of by such assignee reverts to the bankrupt.

CONTRA: *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115.

See Sec. 131, *Lasater v. First Nat. Bank of Jacksboro*.

§96. *Hilburn et al. v. Preston*, 32 S. W. 702.

Under Sayles Civ. Stat., Art. 1379a—providing that when a statement of facts is filed after the time prescribed therefor, and the party tendering it shows to the satisfaction of the reviewing court that he has used due diligence to obtain the approval and signature of the judge, and to file the same within the proper time, the court may permit such statement to remain a part of the record, *does not* apply where the statement of facts is prepared by the judge after failure of the parties to agree on such statement, and the judge fails to file it within the proper time through no fault of appellant, and therefore there being no proper statement of facts in the record, and this through no fault of appellant, the cause will be reversed for that reason alone.

CONTRA: *Anderson v. Walker*, 95 T. 596 (68 S. W. 981).

We cannot consent to the construction placed upon Art. 1379a, by the case of *Hilburn v. Preston*. The first part of said article refers to other sections prescribing the time for filing statements of facts, including the filings when made by the judge. The filing whether done by the party appealing, in person or by the judge, is done for the former. In either case he is the party "filing or tendering," the statement when he seeks to have it considered by the appellate court. It is *his* own failure to file the statement in time which he must excuse, and not the failure of the judge.

NOTE.

In the *Anderson* case the Supreme Court cites the following cases as supporting its position, viz., that the statute applies to statements of both kinds, to-wit: *Osborne v. Prather*, 83 T. 211 (18 S. W. 613); *Telegraph Co. v. Richardson*, 79 T. 649 (15 S. W. 689). In both the cases cited, it was held, that where the Judge failed to do his duty by filing a statement of facts, that it was the duty of the appellant to obtain a mandamus compelling him to do his duty, and where this was not done that the court would not reverse and remand a cause, simply because there was no statement of facts in the record.

The Anderson case was subsequently followed in *Guyer v. Snow*, 90 S. W. 71 (40 C. A. 407), and as in this case the Supreme Court refused a writ of error, the doctrine seems to be firmly established.

§ 97. *Hill v. Dons*, 37 S. W. 638 (C. A.).

For the purpose of impeachment a witness cannot be asked, on cross-examination, if he is under indictment of forgery.

CONTRA: *Texas & P. Coal Co. v. Lawson*, 31 S. W. 843 (10 C. A. 491).

A witness may be asked, on cross-examination if he is not under indictment for embezzlement for the purpose of affecting his credibility.

NOTE.

In *M. K. & T. Ry. Co. v. Creason*, 107 S. W. 527 (T.), the Supreme Court announces that the correct doctrine is announced in *Hill v. Dons*, and in *Boon v. Weathered's Adm.*, 23 T. 675. See the *Creason* case for extended discussion, also see *King's Conflicting Cases*, Vol. 11, Sec. 219, for summary of authorities.

§ 98. *Hillebrant v. Brewer*, 5 T. 586.

It is not necessary in a petition for writ of error to state the names of the persons adversely interested, and if the names appear in the bond or other paper in the proceedings the clerk can look to such papers for the names of the persons to be cited, and when necessary the petition for the writ of error may be amended in the Supreme Court, and the names of persons omitted inserted.

CONTRA: *Weems v. Watson*, 91 T. 35 (40 S. W. 722).

When *Hillebrant v. Brewer*, and other cases following the doctrine therein announced, was decided, there was no statute upon the subject, but since the Revised Statutes of 1879 (Art. 1391), it is required that the petition shall state the names and residence of the parties interested. Therefore since this

statute, the appellate court acquires no jurisdiction unless the names are so stated in the petition, and as there is no statute allowing amendments of the petition in the appellate courts, the petition cannot be amended.

NOTE.

In addition to the Hillebrant case, the following cases are overruled on the same point: *Roberts v. Sollibellus*, 10 T. 352; *Summerlin v. Reeves*, 29 T. 86; *Thompson v. Pine*, 55 T. 427.

The Weems case has been approved by the following authorities: *Bank v. City of Dallas*, 68 S. W. 334 (28 C. A. 299); *Dixon v. Watson*, 91 S. W. 618 (41 C. A. 266); writ of error denied, and *Higgins v. Shephard*, 107 S. W. 79 (48 C. A. 365).

§ 99. *Hinzie v. Moody*, 20 S. W. 769 (1 C. A. 26).

Defendant was a dealer in groceries and hardware, and he owned a store house in which he carried on his business and exposed his goods for sale, and a ware house across the street in another block in which he kept his hardware and heavy goods. Held, that the warehouse being on a separate lot not adjacent to the lot on which the store house stood, was not exempt as a part of defendant's business homestead.

CONTRA: *Rock Island Plow Co. v. Alten*, 111 S. W. 973 (— C. A. —).

The defendant owned four lots, on two of which his store was located in which he conducted his business as a dealer in implements, vehicles, and stoves. On the two other lots which were separated from the store house lot by an intervening lot, was located his ware house in which he kept stored implements used in connection with his business. Held, that the two warehouse lots, altho disconnected from the store house lots, were a part of the defendant's business homestead.

NOTE.

The first case is by Judge Garrett of the Commission of Appeals and the last by Judge Rice of the Court of Appeals for the

Third District. The conflict between the two above cases turns upon the issue whether two separate disconnected lots, altho used for the purposes of a business homestead, can be considered a part of the business homestead, notwithstanding, they are disconnected.

The case of *McDonald v. Campbell* appears to reason in line with the *Hinzie* case but reaches the same result as in the *Rock Island* case.

The case of *Woeltze v. Woeltze*, 57 S. W. 905, by the Court of Appeals for the Fourth District, appears to hold in accord with the *Hinzie* case, for it says, the lot used for a camp yard was no part of the residence homestead and could not be held to be a part of the business homestead because not situated in contiguity therewith.

In the case of *Schneider v. Campbell*, 21 S. W. 55, by the Court of Appeals of the Second District, it is said, we perceive no reason why adjacent lots should not be exempt under the Constitution as a place to carry on an hotel or livery business if such be the business of the family.

In the case of *Parish v. Frey*, 44 S. W. 322 (18 C. A. 271), by the Court of Appeals of the Third District was where a merchant was conducting a grocery business in a stone store house and in a frame store house across the street he was conducting a hardware and tinware business, the court held, that the exemption could not be extended to two places of business in which he was engaged.

It is difficult to determine in which way lies the weight of authority between the cases on the question in conflict, but undoubtedly the great weight of authority is not in favor of the proposition that the contiguity of the lots is a primary consideration in determining whether two separate lots are a part of the business homestead. The weight of authority, however, is to the effect that the first consideration is whether the separate lot which is claimed to be exempt as a part of the business homestead is used in connection with the business in which the head of the family is engaged.

See the following authorities: *Lavell v. Lapowski*, 85 T. 168 (19 S. W. 1004); *Hargadene v. Whitfield*, 71 T. 482 (9 S. W. 475); *Cooper v. Peter*, 80 S. W. 108 (35 C. A. 49); *King v. Shoe Co.*, 51 S. W. 532 (21 C. A. 217); *Bell Hardware Co. v. Riddle*, 72 S. W. 613 (31 C. A. 411); *Warren v. Kohr*, 64 S. W. 62 (26 C. A. 331); *Schoellkopf v. Cameron*, 47 S. W. 548 (19 C. A. 593); *O'Brien v. Woeltze*, 94 T. 152 (58 S. W. 943; 59 S. W. 535); *Freeman v. Cates*, 55 S. W. 524 (22 C. A. 623); *Sanger v. Hicks*, 56 S. W. 775 (22 C. A. 473); *Billings v. Matlage*, 82 S. W. 805 (36 C. A. 619); *Alexander v. Lovett*, 95 T. 661 (69 S. W. 68); *Evans v. Pace*, 51 S. W. 1094 (21 C. A. 368); *Wingfield v. Hackney*, 69 S. W. 446 (30 C. A. 39); *Dignowity v. Lindheim*, 109 S. W. 966; *Lyon v. Files*, 110 S. W. 999

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(50 C. A. 630); *Schmick v. Simmons*, 107 S. W. 568; *Willis v. Pounds*, 25 S. W. 715 (6 C. A. 512); *Waggener v. Haskell*, 89 T. 437 (35 S. W. 1); *Williams v. Willis*, 84 T. 398 (19 S. W. 683); *Pfeiffer v. McNatt*, 74 T. 641 (12 S. W. 821); *Marler v. Handy*, 88 T. 421 (31 S. W. 636); *Henry v. Corpus Christi Natl. Bank*, 44 S. W. 569.

§ 100. *Hirsch v. Patton*, 108 S. W. 1015 (49 C. A. 365).

Under the five years statute of limitation the payment of taxes must be made for each year with reasonable promptness, either when due or demandable, or within such reasonable time thereafter as is usual and customary in the payment of taxes.

CONTRA: *Club L. & C. Co. v. Wall*, 99 T. 591 (91 S. W. 778, 122 Am. St. 666).

To sustain the defense of limitation by possession and payment of taxes for five years under a deed to land duly registered, the defendant must show payment before suit was brought of the taxes for the last year necessary to complete the bar where it was possible to make such payment before that time.

NOTE.

See Sec. 32, *Capps v. Deegan*.

§ 101. *Home Circle Society No. 2 v. Shelton*, 85 S. W. 320.

Exception to the action of the court in excluding testimony altho preserved in the statement of facts will not be considered on appeal, unless preserved in a separate bill of exception.

OVERRULED: *Stephens v. Herron*, 99 T. 63 (87 S. W. 326).

Exception to the exclusion of a deed offered in evidence preserved in the statement of facts and not by a separate bill of exception can be properly considered on appeal.

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NOTE.

The overruled case is by the Court of Civil Appeals for the Fifth District, writ of error to the Supreme Court dismissed for want of jurisdiction. The overruling case is by the Supreme Court, on certified question from the Court of Civil Appeals for the Second District.

The case of *Roundtree v. City of Galveston*, 42 T. 612, holding that "the statement of facts may be made to serve also the purpose of a bill of exceptions," appears to be in accord with the overruling case. *Howard v. Houston*, 59 T. 76, holding that "objections to the ruling of the court must follow the rules prescribed for bills of exception and not those for governing statement of facts," appears also to support the overruling case. After the decision by Judge Brown in the overruling case the Act of April 15th, 1905, was passed providing for stenographers' notes in lieu of a statement of facts, and which contained the following provision:

"All objections to the admissibility of testimony, if any, shown by said stenographic report and the ruling of the court thereon, shall be regarded and considered as though they were separate bills of exception."

The above act was repealed by the Act of May 25th, 1907, whereby the old law article 1360 remains in force.

Judge Brown seems to commend the rule of practice laid down in the case of *Putnam v. Putnam*, 3 Ariz. 192, wherein it is said:

"We think that the practice to allow exceptions to the admission of evidence, as well as to the rejection of proposed evidence, and other rulings and actions of court during the progress of the actual trial of the cause, to be embraced in the statement of facts, is to be commended, as being convenient, simple, and expeditious, and as tending to render the record less cumbersome."

§ 102. *Home Insurance Co. v. Smith*, 29 S. W. 264 (C. A.).

Where an insurance policy covers personal property as well as a house, and the policy contains the clause that the entire policy shall be void if the subject of insurance be buildings upon grounds not owned by the insured in fee simple, and the buildings were upon leased property, held the entire policy was void and the insured could not recover for the personal property lost.

CONTRA: *Bills v. Hibernia Insurance Co.*, 87 T. 547 (29 S. W. 1063).

Under similar facts as above, held that the policy of insurance was entirely void as to the "subject of the insurance" referred to, to-wit, the houses, but was valid as to the personal property.

NOTE.

The cases are explained and the rule in the *Bills* case adhered to in *Sullivan v. Hartford Ins. Co.*, 89 T. 665 (36 S. W. 73), and has been cited in the following national reports, 29 L. R. A. 706; 47 A. S. 121; 86 A. S. 869; and has been followed by *Home Insurance Co. v. Smith*, 32 S. W. 240 (C. A.), but in this case the court held the entire policy void upon another ground, viz., the policy also had a clause that the policy should be void "if the insured has concealed or misrepresented . . . any material fact or circumstance concerning this insurance," and that it was a misrepresentation to claim ownership of the land on which the building was situated, when it was only leased, and that this misrepresentation would avoid the policy.

Also followed in *North British Insurance Co. v. Freeman*, 33 S. W. 1091 (C. A.); *German Ins. Co. v. Lockett*, 34 S. W. 173 (12 C. A. 139); *Sullivan v. Hartford Fire Ins. Co.*, 34 S. W. 999, also 89 T. 665 (36 S. W. 73), where the Supreme Court explains and adheres to the rule in the *Bills* case.

In *Roberts v. Sun Mutual Ins. Co.*, 35 S. W. 955 (C. A.), the court follows the rule of divisibility of the insurance policy where the matters are separately valued, but applies the rule the reverse way, to-wit, both real estate and personal property (a stock of goods), was insured and separately valued in the same policy. The policy contained a clause that the policy should be void unless an iron safe, etc., was kept. Held this only applied to the personal property and the failure to have a safe, etc., did not avoid the policy as to the real estate.

See also *Georgie Home Ins. Co. v. McKinley*, 37 S. W. 606 (14 C. A. 7); *Palatine Ins. Co. v. McKinley*, 37 S. W. 1133 (C. A.); *Phoenix Ins. Co. v. Pfeifer*, 39 S. W. 1001 (C. A.); *American Cent. Ins. Co. v. Green*, 41 S. W. 74 (C. A.); *Georgia Home Ins. Co. v. Brady*, 41 S. W. 513 (C. A.). In *British America Assur. Co. v. Miller*, 91 T. 414 (44 S. W. 60), the Supreme Court explains its decision in the *Bills* case, but does not recede from the rule announced. See also *Phoenix Ins. Co. v. Munger Imp. Cotton Mfg.*

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Co., 49 S. W. 222, 92 T. 297; Hartford Ins. Co. v. Walker, 60 S. W. 820 (C. A.); Delaware Ins. Co. v. Harris, 64 S. W. 867 (26 C. A. 537).

In *Curlee v. Tex. Home Fire Ins. Co.*, 73 S. W. 831, 986 (31 C. A. 471), the *Bills* case is distinguished, and a recovery was not allowed (writ of error denied by Supreme Court).

See also *London & L. Fire Ins. Co. v. Davis*, 84 S. W. 260 (37 C. A. 348); *Ins. Co. v. Andrews*, 89 S. W. 419 (40 C. A. 184), and *Mecca Fire Ins. Co. v. Wilderspin*, 118 S. W. 1131 (C. A.).

The *Bills* case has been cited a number of times in other cases upon the proposition that where two constructions can be given the language of an insurance policy, that construction which serves best to protect the insured will be given to such language.

It would seem therefore from the authorities that the rule announced in the *Bills* case is the law in Texas, although if the rule announced in *Home Ins. Co. v. Smith*, 32 S. W. 240, is followed, insurance companies may very easily avoid the effect of the decision in the *Bills* case.

§ 103. *Houssels v. Taylor*, 58 S. W. 190 (24 C. A. 72).

In a suit against the husband to foreclose a tax lien upon the community homestead the wife is a necessary party defendant.

CONTRA: *City of San Antonio v. Berry*, 92 T. 319 (48 S. W. 496).

In a suit against the husband to foreclose a tax lien upon the community homestead the wife is not a necessary party defendant.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, Associate Justice Hunter delivering the opinion says:

"Our Supreme Court in refusing a writ of error in *Collins v. Ferguson*, 56 S. W. 225, has in effect held that the wife is not a necessary party from the view so taken by our Supreme Court, the writer feels constrained most respectfully to dissent."

The *San Antonio* case is by the Supreme Court and Chief Justice Gaines in holding the wife is not a necessary party relies on and quotes with approval the case of *Jergens v. Schiele*, 61 T. 255, wherein it is said:

"To any proceeding in which the right of homestead is not available as a defense, it is obvious that the wife is not; on account of the fact that the *locus in quo* constitutes the family homestead, a necessary party."

The case of *Bean v. Brownwood*, 43 S. W. 1036, by the Court of Civil Appeals for the first district also holds the wife is not a necessary party.

It is undoubtedly true that the San Antonio case is sustained by the overwhelming weight of authority in holding that the wife is not a necessary party in a suit to foreclose a tax lien upon the community homestead, yet in *San Antonio B. & L. Assn. v. Stewart*, 65 S. W. 655 (27 C. A. 299); *Campbell v. Elliott*, 52 T. 151; *Thompson v. Jones*, 60 T. 94; and *Odum v. Menefee*, 33 S. W. 129 (11 C. A. 119), it is held, she is a necessary party in a suit to foreclose a mechanic's lien on the community homestead. Art. 16, Sec. 50 of the Constitution protects the homestead from forced sale except for the purchase money, taxes, and work and material used in its construction. This constitutional provision is sufficient to warrant a suit against the husband alone for the purchase money, first because the lien for the purchase money is created before the homestead right accrued; and second, the superior title is in the vendor until the purchase money is paid, hence there is nothing to which the homestead right can attach.

But it is believed that the constitutional provision furnishes no warrant for the distinction as to necessary parties between suits to foreclose tax liens and mechanic's liens, for both liens are created after the homestead right has accrued and after the wife's interest therein has attached. If the husband alone is made a party it is difficult to see how under art. 1341, the writ of possession can run against the wife, she not being a party defendant nor claiming under the husband.

Judge Speer's work on the Law of Married Women, page 333, says:

"For whatever may be the disposition of the matters in an action against the husband only, the wife may at any time litigate her rights by again inquiring into the facts. In other words, if a given state of facts be conceded to be binding upon the husband, and to determine his homestead rights, it is not for that reason binding upon the wife, for as against her the facts have not been established. The husband and wife are not in law nor in fact one person, and if authority be sought to oust her by writ of possession from property which is in her possession, such process must be directly sought in the usual way, that is, by a proceeding against her individually."

For conflicts on kindred questions see Vol. 11, Sec. 474 and 508.

**§ 104. Houston Cemetery Co. v. Drew, 36 S. W. 802
(13 C. A. 536).**

The court appointing a receiver is invested with a large discretion as to the necessity for the appointment, and its decision of the facts, on the supporting and counter affidavits, is conclusive.

OVERRULED: Sanborn v. Nelson, 134 S. W. 855.

A receiver should not be appointed in cases where the material allegations of the petition therefor are denied under oath. Moreover, the rule giving conclusive effect to the trial court's finding upon a conflicting state of facts, has no application where there has been no trial upon the merits, and where, the facts under consideration are evidenced by written affidavits—pro and con submitted upon the hearing of an application for an ancillary order.

NOTE.

The overruled case is by the Court of Civil Appeals for the Third District, application for writ of error to the Supreme Court dismissed. The overruling case is by the Court of Civil Appeals for the Second District, and appears to be sustained by the Supreme Court in *Edrington v. Prindham*, 65 T. 612; and *Falfurias Immigration Co. v. Spielhagen*, 127 S. W. 164; as well as authorities elsewhere which hold: A statement of a cause of action alone does not warrant the appointment of a receiver where the allegations are explicitly denied: *Weber v. Wallerstein*, 111 N. Y. App. Div. 700, 97 N. Y. Sup. 852; *Patterson v. McCunn*, 46 How. Pr. (N. Y.) 182; *Henn v. Walsh*, 2 Edw. (N. Y.) 129, where affidavit on part of complainant was met by defendant's positive affidavit, application for appointment of receiver should not be granted in absence of evidence rebutting affidavit: *Whitehouse v. Railway*, 9 Wash. 558, 38 Pac. 152. See also, *Rhodes v. Lee*, 32 Ga. 470; *Lumber Co. v. Soap Co.*, 13 Pa. Co. Ct. 139; *Cameron v. Impliment Co.*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. 26. Where affidavits of plaintiff and defendant are in direct conflict, court should postpone it until a hearing on the evidence: *Jacobus v. Machinery Co.*, 67 N. Y. App. Div. 615, 73 N. Y. Suppl. 289. See also *Downing v. Coal Co.*, 93 Tenn. 231, 24 S. W. 122; *Brady v. Gas Co.*, 106 Fed. 584.

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§ 105. *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 T. 1 (32 S. W. 889; 30 L. R. A. 713, 59 A. S. R. 17).

It is provided by Statute in Texas, (Sayles Civ. Stat. Art. 320), that railway companies and other public carriers shall not limit or restrict their liability as it exists at common law. held, that the statute applies only to shipments beginning and ending in Texas, and not to shipments beginning, but to be concluded in another State.

CONTRA: *Armstrong v. Galveston, H. & S. A. Ry. Co.*, 92 T. 117 (46 S. W. 33).

See Sec. 153, *M. P. Ry. Co. v. Sherwood*.

§ 106. *Houston & G. N. Ry. Co. v. Kuechler*, 36 Tex. 382.

A writ of mandamus can be issued by the District Court against the Commissioner of the General Land Office at the instance of a railroad, to compel issuance of land certificates to which the company is entitled.

CONTRA: *Galveston, B. & C. N. G. R. W. Co. v. Goss*, 47 Tex. 428.

The District Courts have no jurisdiction, by writ of mandamus or otherwise, to control the action of the Commissioner of the General Land office in the issuance of land certificates.

NOTE.

Article 946, Revised Statutes, is as follows:

"The Supreme Court or any Justice thereof, shall have power to issue writs of habeas corpus as may be provided by law; and the said court, or the Justices thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court, and in term time or vacation may issue writs of quo warranto or mandamus against any District Judge or officer of the State government, except the Governor of the State."

Article 4861 provides:

"No court of this State shall have power, authority or jurisdiction to issue the writ of mandamus, or injunction, or any other mandatory or compulsory writ or process against any of the officers of the executive departments of the government of this State, to order or compel the performance of any act or duty which, by the laws of this State, they or either of them are authorized to perform, whether such act or duty be judicial, ministerial or discretionary."

It has been decided that Art. 4861 is limited by Art. 946, and the two together should be construed as if they read, "No court in this State, *except the Supreme Court*, shall have the power, etc.

See *McKenzie v. Baker*, 88 Tex. 677 (32 S. W. 1038).

See *King's Conflicting Cases*, Vol. 2, Sec. 237, where 36 Tex. 389 is shown to be overruled upon another point.

§ 107. *Houston & Texas Central Railway Company v. Adams*,
49 T. 762 (30 Am. Rep. 116).

In a suit for lost or converted goods limitation does not begin to run in favor of a carrier until the consignee has notice of the conversion of the goods, or until the usual and reasonable time for the carriage has elapsed.

CONTRA: *Hooks v. Gulf Beaumont & Kansas City Ry. Co.*, 97 S. W. 516 (C. A.).

Where a carrier fails to deliver the goods shipped, the conversion is presumed to have occurred on the day they were received for transportation, and the cause of action accrues on that day and limitation began to run in favor of the carrier from that day.

NOTE.

The *Adams* case is followed by the Court of Civil Appeals in *G. C. & S. F. Ry. Co. v. Humphries*, 23 S. W. 556 (4 C. A. 335).

The *Hooks* case does not seem to have been cited. The *Adams* case seems to be the better law. See notes 2 Am. St. Rep. 238; 4 Am. St. Rep. 628; 9 Am. St. Rep. 479; 9 Am. St. Rep. 514; 34 Am. St. Rep. 556.

§ 108. *Houston & T. C. Ry. Co. v. Batchler*, 73 S. W. 981 (32 C. A. 14); 83 S. W. 904 (37 C. A. 116).

In an action by a passenger against a carrier for actual damages for an assault on the passenger by the carrier's conductor, the jury may consider in mitigation of damages the unprovoked insults offered the conductor by the passenger at the time of the assault.

CRITICISED: *Houston Elec. Co. v. Park*, 135 S. W. 229, (C. A.).

Provocation on the part of the passenger, cannot be considered in mitigation of actual damages for assault by carrier's conductor, but can only be considered in mitigation of punitive damages.

NOTE.

The criticised case was first tried by the Court of Civil Appeals for the Fourth District, and reversed and again tried by the Court of Civil Appeals for the Fifth District, in which the Supreme Court denied a writ of error, without a written opinion. In each of the opinions by the Courts of Civil Appeals the charge by the trial court to the effect, that insults by the passenger to the conductor which provoked the assault could be considered in mitigation of the actual damage, was approved. Associate Justice Fly in a lengthy and logical opinion in support of the principle announced among other things, says:

"In a civil action, where the assaulted party is claiming damages for injuries to his person, he should not reap the full harvest of compensation for injuries which he forced by a violation of law in using words calculated to produce an assault. The use of the opprobrious epithets and abusive language upon the part of appellee was a violation of one of the penal laws of the state (article 599, Pen. Code 1895), and, having by such crime caused an attack upon his person, the jury should be allowed to consider his conduct in fixing his damages."

The criticising case is by the Court of Civil Appeals for the First District, which does not appear to have ever reached the Supreme Court. Associate Justice Pleasants in speaking of the two opinions in the *Batchler* case, says:

"We are not inclined to follow this holding, as it seems to us that any provocation on the part of the plaintiff which was not sufficient to justify the assault, should logically only be

considered in mitigation of punishment or punitive damages and could not affect the amount of actual damages sustained by the plaintiff."

Thus it will be seen that the question in conflict between the Courts of Civil Appeals has never been directly passed upon by the Supreme Court, and the question must remain open unless it can be solved by the weight of authority elsewhere.

It is true in the cases of *Galveston, H. & S. A. Ry. Co. v. La Puelle*, 65 S. W. 488 (27 C. A. 496); and *Dillingham v. Russell*, 73 T. 47 (11 S. W. 149; 3 L. R. A. 634; 15 Am. St. 753); the question is approached but not decided, the court says:

"We hold that the conductor was the agent and representative of his principal, the railway company, and that his act in assaulting the plaintiff was, in so far as this suit is concerned, the act of his principal; and, if he committed an assault and battery upon the plaintiff, any prior conduct on the part of the plaintiff which would not in law justify the assault and battery, cannot avail the appellant as a defense against the plaintiff's action for damages. Whether or not proof of such provoking conduct might be considered in mitigation of damages, we are not called upon to decide, as that question is not presented. Still it is not amiss to say that such evidence is generally held to be admissible in mitigation of exemplary damages, at least."

In *San Antonio Traction Co. v. Lampkin*, 99 S. W. 574 (C. A.); and *San Antonio Traction Co. v. Davis*, 101 S. W. 554 (C. A.); both by the Court of Civil Appeals for the Fourth District; and *Leachman v. Cohen*, 91 S. W. 809 (C. A.); by the Court of Civil Appeals for the Fifth District, the criticised case is approved.

In the case of *Shapiro v. Michelson*, 47 S. W. 946 (19 C. A. 615); by the Court of Civil Appeals for the Third District, in a civil suit for assault between private parties where there was no such duty as exists between carrier and passenger, it was held, that the party committing the assault could offer in evidence insults in mitigation of exemplary damages.

In *Parham v. Langford*, 93 S. W. 525 (43 C. A. 31), by the Court of Civil Appeals for the Second District, the principle announced is in accord with the criticising case; holding, insulting words can be considered only in mitigation of exemplary damages.

The following foreign authorities hold with the criticised case: *Tyson v. Booth*, 101 Mass. 258; *Robinson v. Rupert*, 23 Pa. St. 523; *Morley v. Dunbar*, 24 Wis. 183; *Kiff v. Youmans* (N. Y.), 40 Am. Rep. 543; *Daniel v. Giles* (Tenn.), 66 S. W. 1128; *Ward v. White* (Va.), 19 Am. St. 883.

The following foreign authorities hold with the criticising case: *Goldsmith v. Joy* (Vt.), 15 Am. St. 923; *Donnelly v. Harris*, 41 Ill.

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126; *Johnson v. McKee*, 27 Mich. 471; *Prentiss v. Shaw* (Me.), 96 Am. Dec. 475; *Jacobs v. Hoover*, 9 Minn. 204; *Baltimore & O. Ry. Co. v. Barger* (Md.), 45 Am. St. 319.

It will be observed that in a number of the cases above cited both from Texas and elsewhere, the question in conflict arose in actions between private persons, between whom there was no contractual relation and neither owed to the other any duty. And on this ground they should probably be distinguished from actions by passenger against carrier between whom there is both a contractual relation and a duty on the part of the carrier to protect the passenger against assaults.

§ 109. *Houston & T. C. Ry. Co. v. Everett*, 86 S. W. 17 (C. A.).

Revised Statutes 1895, arts. 4497-4500, as amended by Acts of Legislature 1899 page 65, providing for penalties for failure to furnish cars upon written demand of shippers, are constitutional.

CONTRA: *Houston & T. C. Ry. Co. v. Mayes*, 201 U. S. 321, (26 S. C. 491).

See Sec. III, *H. & T. C. Ry. Co. v. Mayes*.

§ 110. *Houston & T. C. Ry. Co. v. Buchanan*, 84 S. W. 1074 (38 C. A. 165).

Revised Statutes 1895, art. 4497-4500 as amended by Acts of the Legislature 1899 page 67, providing for penalties for failure to furnish cars upon written demand of shipper, are constitutional.

CONTRA: *Houston & T. C. Ry. Co. v. Mayes*, 201 U. S. 321 (26 S. C. 491).

See Sec. III, *Houston and T. C. Ry. Co. v. Mayes*.

§ 111. *Houston & T. C. Ry. Co. v. Mayes*, 83 S. W. 53 (36 C. A. 606).

Revised Statutes 1895, Art. 4497-4500, as amended by Acts of the Legislature 1899 page 67, providing that when the owner

of any freight desires to ship same, and shall apply in writing to any person in charge of transportation of any railway company, depositing one-fourth of the freight charges with such application, said company must supply the cars required at the point indicated within a reasonable time, in the order in which such applications are made without preference to any one, (the number of days being set out in the Statute), but excusing the Railway Company from compliance in cases of strikes or other public calamity, and providing a penalty of \$25.00 per day per car for the failure to supply the cars according to said written demand, is a proper exercise of the Police Power reserved to the State, and hence not repugnant to the Commerce Clause of the Federal Constitution.

OVERRULED: *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321 (26 S. C. 491).

In so far as such statutes seek to be operative upon interstate shipment they are unconstitutional and void as being an unlawful burden upon such commerce.

NOTE.

A writ of error was refused in the *Mayes* case by the Supreme Court of Texas, and said cause was subsequently followed in *Houston & T. C. Ry. Co. v. Everett*, 86 S. W. 17 (C. A.), and cited as an analogous case in *M., K. & T. Ry. Co. v. Nelson*, 87 S. W. 706 (39 C. A. 269), followed in *H. & T. C. Ry. Co. v. Buchanan*, 84 S. W. 1074 (38 C. A. 165), but when this case was again before the Court of Civil Appeals it was expressly decided upon another point.

The decision of the Supreme Court of the United States was by divided court, Chief Justice Fuller and Justices Harlan and McKenna dissenting, while Justice White took no part in the case, nevertheless, the *Mayes*, *Everett*, *Buchanan* and *Nelson* cases must be considered overruled on this point.

In *Allen v. Texas & P. Ry. Co.*, 100 T. 515 (101 S. W. 792), the Texas Supreme Court analyzes the opinion of the United States Supreme Court in the *Mayes* case, and decides that such opinion is only binding upon it in so far as the question decided affected Interstate Commerce, and while some expressions in the opinion by the U. S. Supreme Court might be taken to mean that the statute was invalid even as affecting Intra-state Commerce, the opinion would

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not be given that effect, nor would the Texas court follow same, but on the contrary it held such statute valid as concerns intra-state commerce. This last case was carried to the United States Supreme Court by the Railway Company, but was dismissed on motion of said Railway Company. (See 214 U. S. 527, 29 S. C. 693), also 15 L. N. S. 733n.

§. 112. *Hughes v. Dubb*, 41 S. W. 994 (91 T. 129).

The District Courts have no jurisdiction in a suit for injunction by private citizen tax payers to restrain the County Judge and the Commissioners Court from holding an election to organize an unorganized county.

CONTRA: *Oden v. Barbee*, 129 S. W. 602 (T).

The amendment of article 5, sec. 8 of the State Constitution, dated September 22, 1891, provides that the District Courts shall have general supervisory control over the Commissioners Courts, etc., confers the power upon such District Courts to entertain a suit for injunction filed by private citizens and tax payers to restrain the County Judge and the Commissioners Court from holding or declaring, etc., elections, and the rule announced in the *Hughes* case is no longer law in Texas.

NOTE.

The case of *Oden v. Barbee*, reported as *Oden v. Barber*, is decided by the Court of Civil Appeals for the Second District, 126 S. W. 676 (C. A.), followed the *Hughes* case supra. The Supreme Court granted a writ of error, and announced the doctrine as above stated. It will be observed that the *Hughes* case is not overruled. The law has simply been changed by Constitutional amendment.

For extended note on this same question see *King's Conflicting Cases*, Vol. 1, Sec. 78, 227 and 250; Vol. 2, Sec. 543.

§ 113. *Hurlbut v. Boaz*, 23 S. W. 448 (4 C. A. 376).

In a suit for malicious prosecution where the jury is charged, that in order for plaintiff to recover they must believe from

the evidence "that the prosecution was without probable cause," but there is omission to charge that must believe that "the charge was false," or that "plaintiff was not guilty of the crime charged," the charge to the jury is fatally defective, because the innocence of plaintiff is one of the requisites entitling him to recovery, and such issue is not covered by the simple charge "That they must believe that the prosecution was without probable cause."

CONTRA: *Porter, et al. v. Martyn*, 32 S. W. 731 (C. A.)

In a suit for a malicious prosecution where the charge to the jury recites that before plaintiff can recover a judgment against defendant, the jury must believe from the evidence that the prosecution was "without probable cause," sufficiently presents to the jury the issue "that the charge must have been false," because if without probable cause, it necessarily follows, that it could not have been true.

NOTE.

In the case of *M., K. & T. Ry. Co. v. Groseclose*, 110 S. W. 477 (50 C. A. 525), the two cases above, with their conflicting doctrines are fully discussed and Judge Wilson writing the opinion follows the older case of *Hurlbut v. Boaz*, arguing that the innocence of the plaintiff is vital to his recovery, and that it might well happen that the plaintiff in fact was guilty of the offense charged, and yet it might be true that the defendant at the time he commenced the prosecution had not probable cause to believe him to be guilty. The court therefore reversed and remanded the case because of the omission mentioned above.

In the case of *Equitable Life Assurance Society v. Lester*, 110 St. W. 499, the question was not precisely the same, but very similar. The charge in that case, upon the refusal of which, error was assigned, was as follows: "You are instructed that the fact that no bill of indictment was found by the grand jury against the said George C. Lester is only admissible for the purpose of showing a termination of said prosecution, and cannot be considered by you as any evidence of malice or want of probable cause," the court sustained the assignment and held (citing *Bekkeland v. Lyons*, 96 T. 255, 72 S. W. 56, 64 L. R. A. 474), that the fact of acquittal is no evidence that can be considered on the issue of want of probable

cause. It seems therefore to be very clear that the one term does not include the other.

N. B.—Since writing the above the case of *M., K. & T. Ry. Co. v. Groseclose*, 134 S. W. 736 (— C. A. —), was again before the Court of Civil Appeals and the court adhered to its former ruling. The Supreme Court denied a writ of error, and it may now be concluded that the case expresses the law in Texas, and that the case of *Hurlbut v. Boaz* is restored as authority.

§ 114. *International & G. N. Ry. Co. v. Hinzle*, 82 T. 623 (18 S. W. 681).

A contract of employment made between parents of a minor son and the employer wherein the parents agree to release the employer from all damages for injuries the minor may receive in the employment, is valid and estops them from recovering any damages sustained by them.

OVERRULED BY: *Galveston H. & S. Ry. Co. v. Piggott*, 116 S. W. 841.

A stipulation in a contract of employment of a minor, whereby his parents waived all claims against the employer for damages in the event of the minor's death in the course of his employment, is contrary to public policy and void.

NOTE.

The overruled case was decided by the commission of appeals and the overruling case by the court of Civil Appeals for the fourth district, in which a writ of error was denied by the Supreme Court. In the last case Associate Justice Neill in an able and exhaustive opinion upon the question in conflict speaks of the overruled case as follows: "That case, though not referred to in the opinion, seems to have been overruled by the Court of Civil Appeals of the Second District in *T. & P. Ry. Co. v. Putnam*, 63 S. W. 910, which holds, in accordance with the weight of authority, as stated in this opinion, and, as the Supreme Court approved the opinion in the Putnam case by denying a writ of error, we think we are safe in saying that the Hinzle case is no longer authority on the question under consideration."

Neither the overruled nor overruling case allude to article 4560, Revised Statutes, which was in force when both of those cases

were tried, and which reads as follows: "No contract made between the employer and employee, based upon the contingency of the injury or death of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding." This provision seems broad enough not only to prohibit the limiting of liability arising from negligence of a fellow servant, but also liability arising directly from the negligence of the master, and as it directly prohibits such contracts between employer and employee, it indirectly prohibits such contracts between the employer and the parents of the employee. If this be true, then such contracts are not only void as against public policy as held in the overruling case, but are also void as being in contravention of the statute.

The following authorities appear to be in accord with the overruled case: *Baltimore & O. S. W. R. Co. v. Voigt*, 177 U. S. 498; *Louisville N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348; *Bates v. Old Colony R. Co.*, 147 Mass. 255; *Blank v. Ill. C. R. Co.*, 182 Ill. 331; *Coup v. Wabash*, 56 Mich. 111, 56 Am. Rep. 374; *Western & A. R. Co. v. Strong*, 52 Ga. 461.

The following authorities are in accord with the overruling case: *Bonner v. Bean*, 80 T. 152, 15 S. W. 798; *Gulf C. & S. F. Ry. v. Darby*, 67 S. W. 446; *Missouri, K. & T. Ry. Co. v. Wood*, 35 S. W. 879; *Tarbell v. Railroad*, 73 Vt. 347, 87 Am. St. Rep. 734; *Memphis Ry. Co. v. Jones*, 2 Head. (Tenn.) 517; *Purdy v. Railroad*, 125 N. Y. 209, 21 Am. St. Rep. 736; *Railway v. Spangler*, 44 O. 471, 58 Am. Rep. 831; *Kansas Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Hissong v. Railway*, 91 Ala. 514; *Otis v. Penn. Ry. Co.*, 171 Fed. 136; *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Johnson v. Fargo*, 184 N. Y. 379, 55 N. E. 388; *Willis v. Grand Trunk Ry. Co.*, 62 Me. 488; *Little Rock & Ft. S. Ry. Co. v. Eubank*, 48 Ark. 466, 3 S. W. 808, 3 Am. St. Rep. 245; *Newport N. & M. V. Co. v. Elfert*, 15 Ky. 575.

The overwhelming weight of authority seems to be in support of the principle announced in the overruling case.

§ 115. *International & G. N. Ry. Co. v. Sein*, 89 T. 67 (33 S. W. 558).

"It is the right and duty of the court at any time before the charges are read to the jury, even before a verdict has been returned, to change the instructions that may have been prepared or given if believed to be erroneous; and a requested charge would be as potent, in suggesting a correct proposition

of law to the court, when brought to the attention of the judge after his charge was prepared as before; and we see no difference between leading a judge into error and confirming an error already committed, at a time when it might have been corrected by calling attention to it, the effect is the same: therefore held, that where a party requests special instructions embodying an incorrect proposition of law, which incorrect proposition is also in the court's charge, it makes no difference whether the request is made before or after the general charge is given, the party having requested the incorrect instruction is estopped from taking advantage of the error.

CONTRA: *Missouri, K. & T. Ry. Co. v. Eyer*, 96 T. 72 (70 S. W. 529).

There are expressions in the case of *I. & G. N. Ry. Co. v. Sein* to the effect that it makes no difference whether the request is made before or after the main charge has been read to the jury. But that these remarks were not necessary to the decision of the case is shown by the opinion itself. We do not see how it can be said that a party has led the court into error by a requested instruction, when the same proposition has already been prepared and submitted to the jury before the request is made." Held that a party is not estopped to claim error for an erroneous instruction in the court's main charge, simply because after the court's main charge is given, he embodies but qualifies the same error in his requested special charge.

NOTE.

In *St. Louis & S. W. Ry. Co. v. Matthews*, 79 S. W. 71 (34 C. A. 302), an attempt is made to distinguish the two cases above. That if there is nothing in the record to indicate whether the charge was requested before or after the general charge was given, then it would fall within the doctrine of the *Sein* case, but if there was something to indicate that it was requested after the court's charge was given then it would fall within the doctrine of the *Eyer* case. This, however, it seems to us to utterly fail to distinguish the cases and does

not alter the fact that if the charge was requested after the main charge was given, according to the *Sein* case it was invited error, and according to the *Eyer* case it was not invited error.

In *St. Louis & S. F. Ry. Co. v. Smith*, 79 S. W. 340 (34 C. A. 612), writ of error refused by the Supreme Court, the *Eyer* case is followed; and in *Western U. Tel. Co. v. Bowen*, 97 T. 621 (81 S. W. 27), the Supreme Court again affirms the doctrine of the *Eyer* case. In *G. H. & S. A. Ry. Co. v. McAdams*, 84 S. W. 1076 (37 C. A. 575), there is rather an obscure expression which would possibly indicate a return to the full doctrine announced in the *Sein* case, but in the opinion on rehearing (84 S. W. 1082) the court explains that it meant that there was nothing in the record to show when the special charge was requested, and with the record in such a condition it would not be presumed that the special charge was asked after the main charge.

The question is very carefully discussed by the Court of Criminal Appeals in *Cartwright v. State*, 93 S. W. 738 (49 Cr. 452), but no attempt is made to distinguish the two cases, but both are cited as authority for the proposition that advantage cannot be taken of "invited error." It would seem therefore that the record did not show whether the charge was requested before or after the main charge was given.

In *Nagle v. Simmank*, 116 S. W. 872 (C. A.), a case in which the Supreme Court denied a writ of error, the following language is used: "In order to avoid subjection to liability for an invited error, it should affirmatively appear that the special instruction was given after the general charge had left the hands of the trial judge," citing the *Eyer* case.

Both the *Eyer* and the *Sein* cases are cited in *M., K. & T. Ry. Co. v. King*, 123 S. W. 151 (C. A.), upon the main proposition of "invited error," and the court concludes that the case at bar fell within the doctrine announced in the *Eyer* case, but so few facts are stated in the opinion it can not positively be stated that the charge was requested after the main charge was given.

§ 116. *International & G. N. Ry. Co. v. Underwood*, 64 T. 463.

The right to have an examination made of one who sues for damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice.

OVERRULED AS DICTA: *Austin & N. W. Ry. Co. v. Cluck*, 97 T. 172 (77 S. W. 403, 64 L. R. A. 494, 104 A. S. R. 863).

In a civil action for an injury to the person, the court, on application of the defendant has no legal right or power to order the plaintiff, without his or her consent, to submit to a physical examination as to the extent of the injury sued for, but the fact that plaintiff has refused to submit to such examination is admissible in evidence as bearing on the credibility and sufficiency of the testimony on which he seeks to recover.

NOTE.

The Supreme Court in the *Cluck* case declares that the question is a new decision in Texas jurisprudence, that is, that the decisions in the following cases, to-wit: *I. & G. N. Ry. Co. v. Underwood*, 64 T. 463; *M. P. Ry. Co. v. Johnson*, 72 T. 95 (10 S. W. 325); *G. C. & S. F. Ry. Co. v. Norfleet*, 78 T. 321 (14 S. W. 703); *G. C. & S. F. Ry. Co. v. Butcher*, 83 T. 309 (18 S. W. 583), while intimating that such examination should be granted under proper circumstances, held in each instance that in each of the said cases the "proper circumstances" did not exist, and therefore declared it was not error to refuse the examination. In effect, therefore, the court in the *Cluck* case declared the expressions dicta in all of the above cases. An examination of the cases themselves shows that with the exception of the *Underwood* and the *Johnson* cases, the court went still further. In the *Norfleet* and *Butcher* cases, especially the latter, the court admitted that some courts had held that such order of examination could be granted against the will of the plaintiff, but the correctness of this rule was doubted. In *G. C. & S. F. Ry. Co. v. Nelson*, 24 S. W. 588 (5 C. A. 387), the question is again presented but not decided. In *C. R. I. & T. Ry. Co. v. Langston*, 47 S. W. 1027, 48 S. W. 610 (19 C. A. 568), a somewhat different question is presented.

It will be observed that the point at present under discussion is, whether upon application of the defendant, where the plaintiff has not exhibited the wounds on his person to the jury, the court can compel the plaintiff to submit to an examination of experts.

In the *Langston* case (*supra*) the question was, after the plaintiff had exhibited her wounded legs to the jury, was the defendant entitled to have them examined by its own experts. This right was claimed, as being in the nature of cross-examination.

The majority of the court upon authority of a Missouri case

(*Haynes v. Town of Trenton*, 27 S. W. 622), held that defendant was entitled to have such examination made. All the Judges, however, agreed that the court could not compel examination where the plaintiff had not first exhibited her person to the jury. This case was before the Supreme Court on certificate of dissent. But the certificate was upon another point, and the court was silent upon this question. (See 50 S. W. 574).

In *G. C. & S. F. Ry. Co. v. Gibbs*, 76 S. W. 71 (33 C. A. 214), the question was presented, but the court held, that while possibly such an examination might be compelled, in "a proper case"—that that case was not a proper case, and reversal was refused although the court below had refused to order the examination. The Supreme Court denied a writ of error in this case.

The case of *G. C. & S. F. Ry. Co. v. Pendery*, 36 S. W. 793 (14 C. A. 60), is cited as authority for the proposition that such examination cannot be compelled.

The *Underwood* case is cited in 9 L. R. A. 443, 14 L. R. A. 479n, 14 L. R. A. 681n, 26 L. R. A. 394n, 34 L. R. A. 214, 64 L. R. A. 497, 70 L. R. A. 114, 24 A. S. 768, 88 A. S. 235, 104 A. S. 866, 15 L. N. S. 664n.

The Supreme Court in reaching the conclusion that it did in the *Cluck* case, thus establishing the rule for civil cases in Texas, that such examination could not be had, practically admits that the weight of authority elsewhere is against its conclusion, and for the rule, that where necessary to promote the ends of justice such examination should be compelled. It, however, bases its contention principally upon the Texas Constitution and bill of rights and the decision in *Ry. Co. v. Botsford*, 141 U. S. 255, 11 Sup. Ct. Rep. 1000, 35 L. Ed. 734. The decision, however, in that case was by a divided court, Justices Brewer and Brown dissenting. Thus the majority opinion in that case supporting the *Cluck* case, and the minority opinion supporting the doctrine indicated in the *Underwood* case.

In *Gray v. The State*, 114 S. W. 635 (55 T. Cr. 90), an analogous question came before the Court of Criminal Appeals, that is, can a court in the interest of justice order that a dead body be exhumed and examined? Justice Ramsey, at that time upon the bench of the Court of Criminal Appeals, after an exhaustive analysis of the authorities including the *Cluck* case disapproves the ruling in the *Cluck* case and decides that when the interests of justice demand it, such an examination may be had. This opinion of Justice Ramsey is peculiarly interesting because as he is now a member of the Supreme Court, should the question be again presented to that court, would he follow the *Cluck* case or not? In *T. C. Ry. Co. v. Wheeler*, 116 S. W. 83 (52 C. A. 603), (writ of error denied by the Supreme

Court), the Cluck case is followed, and it is treated as settled law that in Texas in a civil cause, such an examination cannot be compelled by the Court.

§ 117. Jennings v. Shiner, 43 S. W. 276 (C. A.).

Where justice court disregards a plea of privilege interposed by defendant to be sued in the county and precinct of his residence and ignores the evidence in support thereof, the judgment rendered is void.

DOUBTED: Houston & T. C. Ry. Co. v. Young, 137 S. W. 380 (C. A.).

Where justice court disregards a plea of privilege interposed by defendant to be sued in the county and precinct of his residence and ignores the evidence in support thereof, the judgment is grossly erroneous but not void.

NOTE.

The first case is by the Court of Civil Appeals for the fourth district, in which a writ of error was denied by the Supreme Court. The second case is by the Court of Civil Appeals for the first district but does not appear to have ever reached the Supreme Court.

Coca Cola v. Allison, 113 S. W. 309 (52 C. A. 54), by the Court of Civil Appeals for the fifth district, follows and approves the Jennings case and is also doubted by the Houston & T. C. Ry. Co. case. This case is plainly distinguishable from the two doubted cases. That was a suit in justice court against a railway company for \$14.00, overcharge in freight rate, to which defendant answered that the rate charged was that fixed by the railway commission, which was sustained by the undisputed evidence. Judgment was rendered against the railway company for \$14.00, which was sought to be enjoined on the ground that the justice court was without jurisdiction, and the judgment rendered was void. The Court of Civil Appeals very properly held that while the judgment rendered was grossly erroneous it was not void. In the opinion, however, Judge Reese takes occasion to doubt the principle announced in the Jennings and Coca Cola cases. In those two cases, the justice court failed to acquire jurisdiction of the person of the defendants who were sued out of the precinct of their residence and who had interposed these defenses on proper pleas and sustained them by undisputed proof.

Hence the judgments in those two cases were void for want of jurisdiction and as an appeal would not lie by reason of the amounts, injunctions rightly issued. In the Houston case jurisdiction of the person had been obtained and the judgment while erroneous was not void and an injunction would not lie. From the above reasoning it would appear that the correct result was reached in each of these cases and the principles announced in the Jennings and Coca Cola cases are sound, and the doubt expressed by Judge Reese was not necessary to the decision of the case.

§ 118. *Jenks v. Jenks*, 47 Tex. 220.

There is no statute conferring on notaries public a general power to administer oaths and take affidavits. Such a power is not one of the incidents of the office of notary public, under the law—merchant, and, as it is not, by the statutes of Texas, conferred on notaries of other States, an instrument purporting to be an affidavit, executed before a notary public of another State, by an appellant, stating an inability to give bond, for costs, is not an affidavit, within the meaning of the statute.

CONTRA: *Latimer v. St. Louis S. W. Ry. Co.* 40 C. A. 136 (88 S. W. 444).

An affidavit of inability to pay costs in lieu of a writ of error bond may be made before a notary public of another state.

NOTE.

When the *Jenks* case was decided the law of 1871, p. 74, was in force. That act authorized an affidavit in lieu of a bond but did name the officers before whom the affidavit could be made. On the 5th day of Feby., 1887 (R. S., Art. 7), after the *Jenks* case and before the *Latimer* case was decided, an act was passed authorizing affidavits when made out of the State, before a Clerk of a Court of Record, a Notary Public or a Commissioner of Deeds. Thus the change of statute accounts for the conflict between the cases. In the case of *Wyatt v. Jeffries*, 43 T. 154, decided in 1875, it is held, that a pauper's affidavit made before a County Clerk of another State is insufficient. In the case of *Harvey v. Cunningham*, 62 Tex. 186, decided in 1884, it is held that the affidavit made before a County Judge of another State is insufficient. The Revised Statutes of 1879, Art. 1401, requires the pauper's affidavit to be made be-

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fore the County Judge of the County where the party resides, or before the Court trying the case. This act of course changes the rule announced in the Latimer, Wyatt and Harvey cases. The act of 1879 has also given rise to numerous conflicts.

§ 119. Johnson v. Bibb, 75 S. W. 71 (32 C. A. 471).

If a sale of public school land to a minor in 1898 be void, it is validated by the act of 1899, p. 259.

CONTRA: Walker v. Rogan, 93 T. 248 (54 S. W. 1018).

See Sec. 261, Watson v. White.

§ 120. Jones v. Pyron, 57 Tex. 43.

Title to the land owned by the bankrupt at the time of the adjudication of bankruptcy against him passes to the assignee for the purposes of the trust, though not scheduled, as effectually as though it had been. Land thus owned, and not scheduled as part of the bankrupt's estate, if not disposed of by the assignee in bankruptcy, remains after the termination of proceedings in bankruptcy the property of the bankrupt or of his heirs. The mere omission to schedule such property constitutes no ground either in law or equity for denying to the heirs of the bankrupt the benefit of their title on the termination of proceedings in bankruptcy, as against parties who show no other ground of attack than the failure to schedule it.

CONTRA: First National Bank of Jacksboro v. Lasater, 196 U. S. 115.

See Sec. 131, Lasater v. 1st Nat. Bank of Jacksboro.

§ 121. Jones v. Robbins, 74 T. 615 (12 S. W. 824).

Under the Statute of 1846, it is necessary that when a written instrument is proved for record by a witness who did not see the grantor sign same, that he swear "that he signed the same as a witness at the request of the grantor."

CONTRA: Deen v. Wills, 21 T. 642.

NOTE.

See Sec. 52, *Dorn v. Best*.

§ 122. *Kennon v. Bailey*, 38 S. W. 377 (15 C. A. 28).

Where a person not a payee of a note but having endorsed same before or at the time of delivery to a third person, he becomes an original obligor in the note, and whether he is bound as a surety, or guarantor, or principal, it matters not, he would not be discharged by the failure to protest the note, or to file suit thereon at the first term of court, etc.

CONTRA: (Overruled) *Barringer v. Wilson*, 81 S. W. 533, 97 T. 583 (80 S. W. 994).

Where endorsements are regular and in the order they would be if the note had passed regularly through the hands of the endorser; the instrument itself determines the status of such endorser, and parol evidence is inadmissible to change such status, or to establish that such endorser was an original maker or guarantor, and hence such endorser would be discharged by the failure to protest the note or to file suit thereon at the first term of court, etc.

NOTE.

The *Barringer* case above cited went to the Supreme Court upon certified question, because of the conflict with the *Kennon* case as above set forth. The Supreme Court declared the correct doctrine announced above in the *Barringer* case and in effect overruled *Kennon v. Bailey*, 38 S. W. 377 (15 C. A. 28), and *Beissner v. Weeks*, 50 S. W. 138 (21 C. A. 14). It will be observed that the Supreme Court distinctly approves the doctrine announced in the old case of *Heidenheimer v. Blumenkron*, 56 T. 311, wherein it is announced that the status of endorser and others upon a written instrument, cannot as to the holder be altered by parol evidence, however much amongst themselves they might be able to show one was surety instead of a maker, etc.

The *Kennon* case was followed in *Beisner v. Weeks*, 50 S. W. 138 (21 C. A. 14), which the Supreme Court in effect also overrules.

See also *First Nat. Bank v. Rusk Pure Ice Co.*, 136 S. W. 89.

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§ 123. Kent v. Cecil, 25 S. W. 715 (C. A.).

In the absence of evidence as to the time a deed is delivered, it being acknowledged, its delivery will be presumed as of the date of the acknowledgment.

CONTRA: Kirby v. Cartwright, 106 S. W. 742 (48 C. A. 8).

In the absence of evidence as to the time a deed is delivered, it being acknowledged, its delivery will be presumed as the date of the deed and not as of the date of the acknowledgment.

NOTE.

The decision in the Kent case is by the Fourth Court of Civil Appeals. The decision in the Kirby case is by the First Court of Civil Appeals. The Kirby case is followed by the First Court of Civil Appeals in Beall v. Chatham, 117 S. W. 492 (C. A.).

The reasoning in the Kirby case seems to be the most convincing, because it clearly appears that it is not the acknowledgment which gives effect to the deed, it is the signing which does so. The acknowledgment is for the purpose of registration only. This case points out the further fact, that in the early days of Texas, officers who were authorized to take acknowledgments were few and far between, and that often a deed would be signed and delivered months, even years, before an opportunity to acknowledge same presented itself.

The Supreme Court refused a writ of error in this case, and therefore it is presumed that the preferred rule is, as stated therein, and that Kent v. Cecil is disapproved.

§ 124. Kent v. Cecil, 25 S. W. 715 (— C. A. —).

Where one claiming land by adverse possession, leases it and the lessee merely enclosed it in a pasture containing five thousand acres, this is insufficient under article 3342 R. S. to ripen into a title under the five years statute.

OVERRULED AS DICTA: Smith v. Kenney, 54 S. W. 801 (C. A.).

One who held adversely for five years by virtue of a deed valid on its face duly registered, having actual possession by

enclosure within the bounds of a large tract in excess of five thousand acres, is entitled to the benefit of the five years statute of limitation.

NOTE.

Both the overruled and the overruling cases were decided by Chief Justice James of the Court of Appeals for the Fourth District. In the overruling case he holds that article 3346 was intended only to apply to the ten years statute and as the rule announced in the Kent case was unnecessary to its decision the same is held as dicta and overruled.

The following authorities: *Dunn v. Taylor*, 102 T. 80 (113 S. W. 285); *Cunningham v. Matthews*, 57 S. W. 1115; *Flack v. Breman*, 101 S. W. 540 (45 C. A. 473); *Harris v. Bryson*, 80 S. W. 105 (34 C. A. 532), are in accord with the overruling case and sustain the principle therein announced. Article 3346 is as follows: "Possession of land belonging to another by a person owning or claiming five thousand acres or more of lands enclosed by a fence in connection therewith or adjoining thereto shall not be the peaceable and adverse possession contemplated by article 3343, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof," has no application to adverse possession under the five years statute, hence one holding peaceable and adverse possession for five years under deed duly registered can claim the benefit of the statute of limitation of five years notwithstanding the land claimed is enclosed with a larger tract containing five thousand acres or more.

§ 125. *Kershner v. Latimer*, 64 S. W. 237.

Where in a charge to the jury a number of separate acts of negligence are mentioned, and the non-existence of either of them would render the defendant not liable, it is reversible error for the court to give the charge conjunctively, as each should be presented by the court to the jury as a separate defense.

CONTRA: *Gulf, C. & S. F. Ry Co. v. Hill*, 95 T. 629 (69 S. W. 136).

Where the jury is charged that if they believe in the existence or non-existence of a number of facts, stated conjunctively, they should find a verdict for the defendant, and where the existence or non-existence of any one of the facts would under the law render the defendant not liable, and therefore the charge requires a higher degree of care on the part of the defendant than the law would require, still in the absence of a request on the part of the defendant that the defenses be given in charge disjunctively, it is not reversible error to give such conjunctive charge, unless the charge positively informs the jury that all of such acts or conditions must be believed to exist or that nothing less than the proof of all would discharge defendant, on the absence of any reason to believe that the jury was misled by the conjunctive charge.

NOTE.

Kershner v. Latimer is practically overruled on this point, for full note see Sec. 232, *T. & N. O. Ry. Co. v. Conroy*.

§ 126. *Kidd v. McCracken*, 134 S. W. 839 (C. A.).

Under the statute, providing that plaintiff may take a nonsuit before the jury retires, and, on trial by the judge, before decision is announced, plaintiff cannot take a nonsuit after being informed by the judge of what his decision will be, though a judgment is not then actually rendered.

CONTRA: *Adams v. St. Louis & S. W. Ry Co.*, 137 S. W. 437 (C. A.).

The mere announcement of a trial judge trying a case with a jury of what his decision on a motion for a directed verdict for defendant will be, made in response to the inquiry of plaintiff's counsel, is not an announcement of a decision within the

statute declaring that where a case is tried by a judge a nonsuit may be taken at any time before the decision is announced, and plaintiff is entitled to take a nonsuit.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, in which a writ of error has been granted to the Supreme Court where the same is now pending and will probably not be decided until this work is published. Therefore it is impossible at this time to determine whether the Supreme Court granted the writ upon the question in conflict or upon some other question.

The second case is by the Court of Civil Appeals for the Fifth District, which does not appear to have been reviewed by the Supreme Court.

The Statute, art. 1301, the construction of which occasions the conflict is as follows:

"At any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief; when the case is tried by the judge such nonsuit may be taken at any time before the decision is announced."

So far as can be found there are only two other cases by the Texas courts which seem to touch the question in conflict: *Masterson v. McKlevey*, 21 S. W. 1005, by the Court of Civil Appeals for the First District. The following was assigned as error:

"That the court erred in permitting Mrs. Mary T. Minard to take a nonsuit after the judge trying the case had, in open court, announced his decision."

The court in overruling the assignment said:

"Since Mrs. Minard did not claim any lien upon the McKlevey half interest, and Masterson being entitled only to a foreclosure as to that interest, no possible injury could result to the plaintiff in allowing Mrs. Minard to take a nonsuit, although it was not proper for the court to do so after the decision was announced. It will be further observed that Masterson sought no relief against Mrs. Minard by his pleading. No error being shown prejudicial to the appellant, the judgment of the court below will be affirmed."

The other case is *Hoodles v. Winter*, 80 T. 641 (16 S. W. 427), by the Supreme Court, wherein it is said:

"The right of the plaintiff to take a nonsuit upon his own cause of action was considered of sufficient importance by the Legislature to be given express recognition. Owing to the unexpected contingencies that may occur during a trial it is a

privilege which it may become necessary for the most careful and diligent litigant to exercise, and it is important that the substance and not the shadow alone of the right shall be preserved. It will not unfrequently happen that the party who takes the nonsuit should be relieved from its effect upon a timely application upon such terms as the court may in its discretion impose and as may be proper to promote the end of justice."

Foreign authorities have undertaken to construe the words "before the decision is announced" within the meaning of statutes permitting nonsuit.

In *Burns v. Reigelsberger*, 70 Ind. 522, held statement by trial judge, after close of argument, that there is a lack of evidence to sustain one branch of plaintiff's case, is not the announcement of his finding.

In *Beard v. Becker*, 69 Ind. 498, held that an intimation by the court, after hearing the evidence, that some of plaintiff's allegations are not sustained, is not an announcement of his finding.

In *Somerville v. Johnson*, 28 Pac. 373, held, that where the court states what his finding will be when written, is not an announcement of the decision.

Until the Supreme Court shall have passed upon the two cases in conflict the question must remain open.

It may be proper, however, to suggest that the part of the statute in question denying the right of nonsuit to the prejudice of a claim for affirmative relief, is mandatory and the disregard of which will be reversible error. But that part of the statute giving the right of nonsuit "at any time before the jury have retired" or "at any time before the decision is announced," is merely directory, the enforcement of which is left to the sound discretion of the trial judge, and the allowance of the nonsuit will not be reversible error.

§ 127. *Klumpp v. Stanley*, 113 S. W. 602 (52 C. A. 239).

Act of April 23, 1907 (Laws of 1907, p. 308, Ch. 165) amending Revised Statutes 1895, Act 2312, and providing that every instrument which has been recorded for ten years whether acknowledged as provided by law or not, shall be admitted as evidence without proving its execution, etc., simply renders admissible in certain cases instruments which had been recorded a designated period of time, and which could not otherwise be introduced, but would have to be proved as at

common law, and did not validate a deed of a married woman void from its inception because not executed or acknowledged as required by Act of April 30, 1846. The Act was not intended by the Legislature to have such effect, and if it was so intended the courts would not give it the effect of validating a deed of an individual which was absolutely void from its inception, as a married woman's deed is, unless properly acknowledged.

CONTRA: *Downs v. Blount*, 170 Fed. Rep. 15.

A married woman's deed containing an insufficient acknowledgment, but otherwise valid, was admissible as proof of title after the passage of Act. of 30th Legislature, Texas (Laws 1907, p. 308, Ch. 165), more than ten years after the deed was recorded, providing that under certain circumstances an instrument, if recorded for ten years, whether proved or acknowledged in such manner as required at the time it was recorded or not, shall be admitted in evidence in any suit in the State without proof of its execution. A married woman's deed defectively acknowledged is not void, but voidable.

NOTE.

Klumpp v. Stanley decided by the Court of Civil Appeals for the Fourth District is followed by *Holland v. Votaw*, 130 S. W. 884 (C. A.), in which last case the Supreme Court refused a writ of error, and in doing so expressed its approval of the doctrine therein announced. It may therefore be considered that the Texas courts are settled upon the doctrine announced in *Klumpp v. Stanley*. (See *Holland v. Votaw*, 131 S. W. 406 (T.); *March v. Spring*, 133 S. W. 529 (C. A.), follows the same authority. In fact the Texas authorities are united upon the subject.

In the case of *Downs v. Blount*, the decision was by a divided court, (Judge McCormick indicating his dissent), and turns upon the use of the term "void," and "voidable," holding that such a deed of a married woman is not "void" but merely voidable. This construction, however, is clearly erroneous, if previous decisions of the Supreme Court are to be considered. (See *Holland v. Votaw*, *supra*).

The Federal Court cites the following Texas cases as supporting its conclusion, viz., *Sims v. Sealey*, 116 S. W. 630; *Millwee v. Phelps*,

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115 S. W. 891; *Ariola v. Newman*, 113 S. W. 157 (51 C. A. 617), and *Haney v. Gartin*, 113 S. W. 166 (51 C. A. 577). In the first two cases mentioned there was no question of married woman's acknowledgment at all, in other words they referred to the class of cases that all the courts admit was covered by the statute.

In the *Ariola* case there was a married woman's acknowledgment, but it was found that her signature to the deed was not necessary to the conveyance of the property, it therefore made no difference whether she properly acknowledged same or not.

In the *Haney* case some expressions of the court might give some support to the contention, but it does not appear from the facts of the case, that the wife's signature was necessary in that case.

It is not believed now that the Supreme Court of Texas has announced its adherence to the doctrine of *Klumpp v. Stanley*, thus establishing it as a rule of property concerning real estate in Texas, that even the Federal Court will ever follow *Downs v. Blount* in the future.

§ 128. *Lake v. Bulware*, 35 S. W. 24 (12 C. A. 660).

Where a family has an urban homestead which has reached the value of \$5,000, and then acquires other property, and uses it for homestead purposes in connection with that formerly owned, the property last purchased does not become a part of the homestead, but is liable absolutely to the debts of the owner.

CONTRA: *Fitzhugh v. Connor*, 74 S. W. 83 (32 C. A. 277).

Where a debtor owns a homestead worth \$5,000 or more, and subsequently acquires adjoining property, the court will view the transaction as if the whole property was acquired at the date of the last purchase, and the debtor may select out of it such portion as he may choose for a homestead, not to exceed \$5,000 in value, exclusive of improvements; the excess to be subject to the judgment creditor's lien.

NOTE.

The first case was by the Court of Civil Appeals for the Second District and writ of error denied by the Supreme Court. The second case was by the Court of Civil Appeals for the Third District but

never reached the Supreme Court. The conflict between the two arises rather from the language used than the result reached, for both cases arrive at the same result.

The following cases incidentally discuss the question in conflict and regulate the mode by which the excess in the homestead may be reached by creditors: *Hargadene v. Whitfield*, 71 T. 491 (9 S. W. 475); *Paschal v. Cushman*, 26 T. 74; *Jenkins v. Volz*, 54 T. 636; *McLane v. Paschal*, 74 T. 20 (11 S. W. 837); *Richards v. Nelms*, 38 T. 447.

§ 129. *Lamb v. James*, 87 T. 485 (29 S. W. 647).

Public lands are not a lawful subject matter of private contracts, and an attempted conveyance thereof by one person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and the conveyance is therefore void as contrary to public policy.

LIMITED: *Rayner Cattle Co. v. Bedford*, 91 T. 642 (45 S. W. 554).

A conveyance of public domain by private person to another is not void as against public policy altho such sale is without consideration, and the vendee can for that reason have the purchase money notes cancelled.

NOTE.

Both of the above cases are by the Supreme Court. The *Rayner* case being the latest expression of the Supreme Court must prevail.

Upon the question as to whether the vendee of public land can recover from his vendor the purchase money paid, when he has subsequently acquired the land from the State, and whether he can maintain an action against his vendor under a quit claim deed, and if so what is his measure of damage, the decisions are not uniform. In the case of *King v. Sullivan*, 92 S. W. 51, by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court, where the vendor conveyed to the vendee to secure a debt land held under a void location and the State refusing to issue patent the vendee bought the land from the State and sued upon the vendor's covenant of warranty, held, that he was entitled only to recover what he paid the State in obtaining the patent. In the case of *McClelland v. Moore*, 48 T. 355, by the Supreme Court, where the

vendor sold the vendee 913 acres of land, 203 of which proved to be vacant land, the vendee then located a certificate upon the vacancy and obtained a patent. The vendor sued for that part of the purchase money unpaid. Held, the vendee was entitled to a credit for the amount expended in obtaining a patent. In the case of *James v. Lamb*, by the Supreme Court, where Still purchased from the State school land paying a part of the purchase money and executing his notes to the State for the balance, his title failing by reason of his not becoming an actual settler thereon. He then sold the land to James by deed with covenant of warranty who assumed the payment of the notes due the State. James then by deed of warranty conveyed the land to Lamb for \$200.00 cash and four notes of \$294.05 each and also assumed the Still notes due the State. Both James and Lamb had notice of the defect in Still's title. Lamb having settled on the land purchased same from the State paying therefor \$333.00 more than the aggregate amount of the Still notes due the state and the four notes executed to James. Lamb then sued to recover the \$200.00 paid and to cancel the notes outstanding, held, that as the deed was without consideration Lamb was entitled to recover the \$200.00 paid and have the notes canceled. In the case of *Rayner v. Bedford*, two parties at different times attempted to purchase from the State a school section each paying to the State the cash payment required by law and each executing notes to the State for the balance. The State refusing to consummate either purchase on account of the land being in conflict with other surveys and withdrew them from sale. The Rayner Cattle Company bought from the first purchaser, and Bedford bought the same land afterwards from the second purchaser. Thereafter the Rayner Cattle Company for \$691.20, one-fifth cash, balance in four notes, conveyed the same land by quit claim deed to Bedford. In a suit brought on the notes to foreclose the lien, held that plaintiff was not entitled to recover on account of failure of consideration, and that the notes be cancelled, and further that defendant was entitled to recover the cash payment but for the bar of the statute of limitation. In the case of *Johnson v. Blum*, 66 S. W. 461 by the court of Appeals for the Second District, a vendor by deed of general warranty conveyed to a vendee a tract of land, the title to which had failed by reason of not being subject to location. In a suit for the purchase money, held, that the vendee was entitled to recover the money paid with interest by reason of the covenant but expressed a doubt of liability in the absence of the warranty.

In the case of *Tatum v. Kincannon*, 119 S. W. 113, by the Court of Civil Appeals for the Third District, "Defendant took all the necessary steps to entitle him to purchase public land, and the Commissioner of the Land Office refused to issue the patent, and returned

the purchase money. Thereafter defendant conveyed the land to plaintiff, who conveyed to another, who afterward, with plaintiff's advice and assistance, purchased the same land from the State to prevent eviction; plaintiff's vendee then knowing all the facts as to defendant's contract to purchase. Defendant was in possession of the land, when he contracted to purchase it, and delivered possession to plaintiff, who, with his grantee, have since held possession. Held, in an action for breach of warranty of title, that plaintiff could recover no more than the unpaid purchase money under defendant's contract to purchase."

The following cases bear upon the questions in conflict: *Houston v. Dickson*, 66 T. 79 (1 S. W. 375); *Palmer v. Chandler*, 47 T. 335; *Rodgers v. Dally*, 48 T. 578; *Green v. Chandler*, 25 T. 155; *Wheeler v. Styles*, 28 T. 240; *Palmer v. Chandler*, 47 T. 332.

§ 130. *Landa v. Lattin*, 46 S. W. 48 (19 C. A. 246).

Where a bank becomes the assignee of a draft, bill of lading attached, for goods that are shipped, it becomes responsible to the consignee (drawee) upon the contract of the consignor, and this whether, by the transfer of the bill of lading, the goods and contract of sale were thereby actually sold to the bank, or whether the bill of lading was attached as a mere security, therefore where, a consignor of wheat delivered to a bank a bill of lading with draft drawn upon the consignee, and the bank cashed the draft and paid the consignor and the consignor had contracted to furnish sound wheat, but the wheat furnished was of inferior quality, held that the bank purchasing the bill of lading, became the owner of the wheat, and was responsible to the consignee for the failure to furnish sound wheat; becoming the purchaser of the goods, it must at its peril exercise care to see that the goods are of the quality that the consignor contracted to furnish.

CONTRA: *Blaisdell v. Citizens Natl. Bank*, of Tyler, 96 T. 626 (75 S. W. 292) (97 A. S. R. 944) (62 L. R. A. 968).

A bank by the purchase and becoming the assignee of a draft with bill of lading attached for goods that are shipped, becomes only the qualified owner of the goods, that is it becomes

the owner in the limited sense that it could hold and control the goods until the draft is paid, but in the absence of an affirmative agreement to carry out the contract, it does not become bound to perform the contract of the vendor or consignor, nor can one who has accepted or paid such draft drawn upon him defeat his acceptance or recover from said bank the money paid because there was no consideration or the consideration has failed as between him and the drawer (consignor) when the bank bought said draft without knowledge of said defense.

NOTE.

Rarely has a division of a court created as much interest or excitement in the business and banking world as did the decision in the *Landa v. Lattin* case. It was at once perceived that if the doctrine therein announced continued to be law, that business and banking methods would be revolutionized.

The decision in the *Landa* case was very shortly thereafter followed by the Supreme Court of North Carolina in the case of *Finch v. Gregg*, 35 S. E. 251, which case is also reported in 49 L. R. A. 679, with an extended note showing that the two cases were not in accordance with the weight of authority.

The question was again discussed in a case decided by the Supreme Court of Iowa, see *Tolerton v. Anglo-California Bank*, 84 N. W. 930 (50 L. R. A. 777), where the court reached the conclusion that both the *Landa v. Lattin*, and *Finch v. Gregg* were erroneous and contrary to the weight of authority.

The authority of *Landa v. Lattin* was questioned in *Gregory v. Sturgis Nat. Bank*, 71 S. W. 66. That is the court held that where a bank simply holds the draft for collection, it was not liable for a breach of the drawee's contract and therefore the facts of the case did not come within the doctrine set forth in the *Landa* case. The decision goes further, however, and says that the *Landa* case goes further than any case of which the court has knowledge.

Blaisdell v. White et al., 76 S. W. 70, is really the same case reported under the name of *Blaisdell & Co. v. Citizens Natl. Bank* (75 S. W. 292), 96 T. 626. The Court of Civil Appeals certified the question to the Supreme Court, which answered in effect overruling the *Landa* case.

The question came up for consideration by the Supreme Court of Tennessee in *Leonhardt & Co. v. Small & Co.*, 96 S. W. 1051, and the doctrine announced in the *Landa* case disapproved. The Kansas

Supreme Court also refused to follow the Landa case in *Hall v. Keller*, 62 L. R. A. 758. The *Blaisdell* case seems to be in accord with the weight of authority everywhere.

For further discussion of this question see *Texas Steamship Co. v. Dupree Commission Co.*, 131 S. W. 621 and *First Natl. Bank v. Mineral Wells & L. P. St. Ry. Co.*, 133 S. W. 1099.

§ 131. *Lasater v. First National Bank of Jacksboro*, 96 Tex. 345 (72 S. W. 1057).

1st. A cause of action for the recovery of a penalty for the receiving of usurious interest, on the bankruptcy of the owner of the cause of action, passes to the trustee in bankruptcy.

2nd. Where such a claim has not been reduced to possession by the trustee nor otherwise administered upon by him, upon the discharge of the bankrupt, such cause of action reverts to the former owner and he may sue upon same.

3rd. Where a person sells property and as part of the consideration the purchaser assumes and renews obligation, and subsequently pays the usurious contract, such payment by the purchaser is a payment by the vendor, and the vendor may sue to recover the penalty for the collection of usurious interest.

CONTRA: *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115.

1st & 2nd. A cause of action for the recovery of a penalty for the receiving of usurious interest, on the bankruptcy of the owner of the cause of action, passes to the trustee in bankruptcy, and upon the refusal of the trustee to take possession of same, or his failure to otherwise administer upon it, upon the discharge of the bankrupt it would revert to him and he could sue upon it, but where the bankrupt did not list said claim nor otherwise call same to the attention of the trustee or the creditors, and they did not know that the bankrupt had such a claim, it would not revert to him and he could not sue upon it. If the claim was of value it was something to which the creditors were entitled, and a bankrupt could not by

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withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property.

3rd. The mere discharge of the original obligation by the purchaser of the property, giving his own note in renewal of the original obligation would not uphold a recovery on account of the usurious interest in the original note, the payment contemplated by the statute is an actual payment and not a further promise to pay.

NOTE.

The United States Supreme Court declined to pass upon the question whether or not when the renewal note was actually paid, that such payment could avail the original note maker, but reversed the Texas courts upon the points above set forth, and remanded the cause for further proceedings not inconsistent with its opinion.

§ 132. Lazarus v. Swafford, 39 S. W. 389 (15 C. A. 367).

Since the amendment of Art. 5, Sec. 16 of the Constitution, the county court has exclusive jurisdiction of suits for the issuance of injunctions and other extraordinary writs where the amount involved is more than \$200.00, and less than \$500.00, exclusive of interest.

CONTRA: Anderson v. Ashe, 90 S. W. 872 (99 T. 447).

The District Courts have jurisdiction to issue mandamus and other extraordinary writs independently of the amount involved.

NOTE.

See Sec. 16, Bigby v. Brantley.

§ 133. Lewis v. Smith, 43 S. W. 294 (C. A.).

In a justice's court, where the defendant pleaded a sum in reconvention, and the justice rendered a general judgment for plaintiff, such judgment adjudicates the matter so pleaded as fully as if it had given judgment for such matter, and then deducted it from the amount found for plaintiff.

CONTRA: Sapp v. Anderson, 135 S. W. 1068 (C. A.).

A judgment in justice's court for plaintiff without disposing of defendant's plea in reconvention is not a final judgment disposing of the entire matter in controversy.

NOTE.

The Lewis case is by the Court of Civil Appeals for the Fourth District, wherein it appears that Lewis brought suit in justice's court on an open account for \$152.25, and Smith pleaded in reconvention \$100.00, judgment was rendered for the plaintiff for \$80.00, no mention being made of the plea in reconvention. Defendant appealed to the county court where the appeal was dismissed on the ground that as the defendant's plea was not disposed of there was no final judgment. The Court of Civil Appeals held this to be error.

The Sapp case is by the Court of Civil Appeals for the Third District, wherein it appears that Anderson brought suit in justice's court for \$75.00 to which Sapp pleaded in reconvention \$113.50. Judgment was rendered in favor of plaintiff for \$50.00. No mention being made of defendant's plea. On appeal to the County Court the appeal was dismissed on the ground that as the plea in reconvention was not disposed of there was no final judgment. The Court of Civil Appeals held that this was not error.

In Bemus v. Donnegan, 43 S. W. 1052 (18 C. A. 125), by the Court of Civil Appeals for the Fourth District, on the same state of facts the court adhered to its opinion in the Lewis case, and criticised Clopton v. Herring, and Gulf, C. & S. F. Ry. Co. v. Stephenson.

In Gulf, C. & S. F. Ry. Co. v. Stephenson, 26 S. W. 236 (C. A.), by the Court of Civil Appeals for the Third District, on similar facts to those in the Sapp case except the want of finality of the judgment was raised by injunction. The court held in accord with the Sapp case.

In Clopton v. Herring, 26 S. W. 1104 (C. A.), by the same court, it is held in accord with the Sapp case: "A judgment rendered by a justice of the peace is not final where it does not dispose of defendant's cross demand asking affirmative relief."

In Huggins v. Reynold, 112 S. W. 116 (61 C. A. 504), by the Court of Civil Appeals for the Second District, the appeal was dismissed because the judgment below failed to dispose of the counter claim, holding in accord with the Sapp case.

In Pecos & N. T. Ry. Co. v. Epps, 117 S. W. 1012, by the Court of Civil Appeals for the Sixth District, it is held, that a judgment for plaintiff, whether nil dicit or on trial, is not final, unless it

disposes of the matters pleaded by defendant setting up a cross action against codefendant. And is in accord with the Sapp case.

In *American R. M. Co. v. City of Crocket*, 49 S. W. 251 (C. A.), by the Court of Civil Appeals for the Fourth District, it is held, "Where defendant pleads in reconvention and a judgment for costs is rendered for him without in any way referring to his cause of action in reconvention, the judgment is not final, so as to be appealable." Citing the *Lewis* case but appears to hold in accord with the Sapp case.

In *Kirby v. Linn*, 34 S. W. 169 (C. A.), by the Court of Civil Appeals, for the Fourth District, it is held, that a judgment which fails to dispose of the issues raised by a cross petition is not appealable. Which is in conflict with the *Lewis* case and in accord with the Sapp case.

In *Linn v. Arambould*, 55 T. 611, by the Commission of Appeals, it is held: "The defendant having prayed for a condemnation and sale of the land to satisfy their claim for purchase money, and that issue remaining undisposed of, the judgment was interlocutory, from which no appeal could be taken," which accords with the Sapp case.

In *Texas & P. Ry. Co. v. Fort Worth St. Ry. Co.*, 75 T. 83 (12 S. W. 977), by the Supreme Court, it is held, there is no final judgment where plea in reconvention is not disposed of. In accord with the Sapp case.

The Court in the *Bemus* and *Lewis* cases bases its conclusion on what is said in *Ruckley v. Fowlkes*, 89 T. 613 (36 S. W. 77), to the effect that the presumption obtains that the court disposed of every issue presented by the pleading. By reference to that case it will be seen, that the issue there involved was *res judicata* as to a part of plaintiff's cause of action, and the ruling there announced can have no application to judgments like those under discussion, wherein there was a cross action pleaded but not disposed of.

The holding in the Sapp and other cases in accord with it, are based upon the construction of the statute requiring judgments to dispose of the rights of the parties in the matters in controversy. That when the judgment is silent as to defendant's cross bill or plea in reconvention, the disposition of which being as necessary as plaintiff's cause of action, then the judgment is not final. Altho the record may show that defendant's cross action was a matter in issue, it must appear from express recitals in the judgment and not inferentially that it was disposed of.

In view of the great weight of authority supporting the Sapp case it must be considered that the *Lewis* and *Bemus* cases are at least impliedly overruled.

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§ 134. *Lindsey v. State*, 66 S. W. 332 (27 C. A. 540).

A certificate of the county clerk to an abstract of judgment "showing the names of each plaintiff and the names of each defendant in said judgment and the number of the pages of the book upon which said abstract is of record" furnishes no proof that the abstract was alphabetically indexed.

CONTRA: *Abee v. Bargas*, 100 S. W. 191 (45 C. A. 243).

A certificate of a county clerk, attached to an abstract of judgment, which recited that the abstract was entered on the judgment index showing the name of each plaintiff and of each defendant in the judgment, etc., presumptively showed an indexing of the judgment in alphabetical order as required by statute.

NOTE.

The question in conflict between the above cases is where a certificate by the clerk is offered in evidence showing that the abstract was indexed, does this certificate furnish proof affirmatively that the abstract was indexed alphabetically. The first case holds the negative of the proposition while the last case the affirmative. *Gin Co. v. Oliver*, 78 T. 182 (14 S. W. 451); *Olcott v. Gabert*, 86 T. 121 (23 S. W. 985); *Nye v. Gribble*, 70 T. 458 (8 S. W. 608); *Nye v. Moody*, 70 T. 434 (8 S. W. 606); *Central Coal & Coke Co. v. Bank*, 34 S. W. 383 (12 C. A. 334); *Burnett v. Cockshatt*, 21 S. W. 950 (2 C. A. 304); *Willis v. Smith*, 66 T. 31 (17 S. W. 247); *Von Stien v. Trexler* 23 S. W. 1047 (5 C. A. 299); *Glasscock v. Stringer*, 32 S. W. 920.

§ 135. *Linney v. Matton*, 13 T. 449.

Spoken words which impute to a female want of chastity are not actionable per se, and without proof of special damages, there can be no recovery.

CONTRA: *Zeliff v. Jennings*, 61 T. 458.

Under the law as it now exists in this State, words spoken or written which "falsely and maliciously" or "falsely and wan-

tonly" impute to a female a want of chastity are actionable, without showing special damages arising therefrom.

NOTE.

The doctrine announced in *Linney v. Maton* (supra); *McQueen v. Fulgham*, 27 T. 464, and *Rose v. Fitch*, 58 T. 151, is thus seen to be in effect overruled.

Zeliff v. Jennings, 61 T. 458, is followed by *King v. Sassaman*, 54 S. W. 304 (same case 64 S. W. 937); *Patterson v. Fraser*, 79 S. W. 1077, same case 93 S. W. 149, 94 S. W. 324 (100 T. 103).

In *Hatcher v. Lange*, 81 S. W. 289 (98 T. 85), the question was certified to the Supreme Court, and that Court in its answer to the question definitely settled the question in favor of the law as announced in the *Zeliff* case. There are notes upon the *Linney* case as follows, 4 L. N. S. 561 n.; 12 A. D. 45 n.; 72 A. D. 429 n.; 72 A. D. 433-434.

The *Zeliff* case has also been the subject of many notes which can be found in 30 L. R. A. 526 n-531-, 58 L. R. A. 942, 72 A. D. 435 n, 27 A. S. 740, 54 A. S. 651, 92 A. S. 161, 92 A. S. 170n, 14 L. N. S. 1009, 1011, 1017, 1018, 123 A. S. 736.

It will be observed, however, that the Supreme Court in the *Hatcher v. Ranger*, 81 S. W. 291 (98 T. 85), makes it plain, that the cases which are mentioned as in effect overruled, are not technically so. That is, the Court contends that the decisions in these cases were correct at the time they were rendered, and it is simply a change of the Statute law which changes the doctrine. In further explanation of this, the court shows that the doctrine of the earlier cases was the doctrine of the Common Law, that the courts were governed by the Common Law, when not changed by statute, and that at the time these decisions were rendered there was no law defining the crime of fornication. It is true, that one decision was made after such a law existed in Texas (to-wit, *Ross v. Fitch*, 58 T. 149), but the court says, that the law must have been overlooked.

The court says that there were *two* such decisions, only one can be located (to-wit, *Ross v. Fitch*). The best expression therefore of the law as it now exists may be found in the case of *Hatcher v. Ranger*, 81 S. W. 289 (98 T. 85).

§ 136. *Loessin v. Washington*, 57 S. W. 990 (23 C. A. 515).

The occupancy by the sons of the lands apportioned to them in the partition, as their homesteads, and their intention to

so occupy adjacent land in which they had interests in remainder, subject to the life estate in the widow, are not sufficient to create a homestead interest in the lands held in remainder.

CONTRA: *Birdwell v. Burleson*, 72 S. W. 446 (31 C. A. 31).

See Sec. 86, *Hampton v. Gilliland*.

§ 137. *Lloyd v. Capps*, 29 S. W. 505 (C. A.).

The measure of damages for the breach of a contract of lease, when the plaintiff has not paid the rent, is the difference between the agreed rent and the worth of the use of the land.

OVERRULED: *King v. Griffin*, 87 S. W. 844 (39 C. A. 497).

The value of crops which might probably have been made on leased land during the term, less the amount of the unpaid rent, is a proper element of damages for breach by the lessor of his contract to lease the land.

NOTE.

The overruled case was decided by the Court of Appeals for the first district, and the overruling case by the Court of Appeals for the Fifth District, neither of which ever reached the Supreme Court. Owing to the conflict between these two cases the Court of Appeals for the Fourth District in the case of *Rogers v. McGuffy*, 96 Tex. 565 (74 S. W. 753 and 75 S. W. 817), certified the case to the Supreme Court. That Court disapproved the overruled case and approved the measure of damages as laid down in the overruling case. The case of *Brincefield v. Allen*, 60 S. W. 1010 (25 C. A. 258), is in accord with the overruling case, altho in the case of *Rogers v. McGuffy*, 96 Tex. 565 (74 S. W. 753), the reporter of the Supreme Court in the syllabus erroneously states that the *Brincefield* case is disapproved. The following hold with the overruling case: *Freemant v. Slay*, 88 S. W. 404; *Putnam v. St. Louis, S. W. Ry. Co.*, 94 S. W. 1102 (43 C. A. 448); *Waggoner v. Moore*, 101 S. W. 1058 (45 C. A. 308); *Crews v. Cortez*, 113 S. W. 523 (52 C. A. 644); *Fagan v. Voigt*, 80 S. W. 665 (35 C. A. 528).

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§ 138. Long v. Green, 95 S. W. 79; 100 T. 510 (101 S. W. 786).

A right of action to recover the statutory penalty for infractions of a liquor dealer's bond is terminated by the taking effect of the local option law in the county before the trial of the action.

CONTRA: Kerr v. Mohr, 103 S. W. 210 (47 C. A. 1).

The right of action to recover the statutory penalty for infractions of a liquor dealer's bond is not terminated by the taking effect of the local option law in the county before the trial of the action, because the general law in regard to sale of liquors is not repealed by the local option law, such general law is merely suspended.

NOTE.

The Supreme Court granted a writ of error in the Long v. Green case, 100 T. 510 (101 S. W. 786), stating that it did not agree with the doctrine announced in that decision. Upon hearing however, the court concluded that it was without jurisdiction to grant the writ, and therefore did not decide the question. It clearly, however, indicated that it did not agree with the doctrine announced, and it would therefore seem that Kerr v. Mohr announces the better doctrine.

§ 139. Longcope v. Bruce, 44 T. 434.

Where an indemnity bond is given an officer after an illegal levy, the surety is not liable on said bond as a joint trespasser.

CONTRA: Hines v. Morris, 81 S. W. 791.

A surety on an indemnity bond, given after an illegal levy, to prevent the officer from returning the property, is liable on such bond, as a joint trespasser with the principal.

NOTE

The decision in the Longcope case is doubted by the Supreme Court in the case of Cabell v. Shoe Co., 81 T. 108 (16 S. W. 811),

and the doctrine announced in the Hines case apparently had the support of the older cases of *Illies v. Fitzgerald*, 11 T. 417; and *Dewitt v. Oppenheimer*, 51 T. 103. The *Illies* case, however, may be said to be more limited than the Hines case, in this, to-wit: The Court says that it makes no difference in the liability on the indemnity bond whether it was given before or after the levy, "if the sheriff did not know that the process was void when he took the bond."

Query. Suppose he knew the levy to be illegal, before he took the bond?

(For contra case to *Longcope v. Bruce* on another point see *King's Conflicting Cases*, Vol. 2, Sec. 295.)

§ 140. *Martin v. Moran*, 32 S. W. 904 (11 C. A. 511).

Where the premiums of an insurance policy on the life of the husband, payable "as directed by will," are paid out of the community estate, the wife is, on death of the husband, entitled to one-half of the proceeds of the policy, though his will makes the entire proceeds payable to his own estate.

CONTRA: *Rowlett v. Mitchell*, 114 S. W. 845 (52 C. A. 589).

Where a husband procured a life policy for the benefit of his children by a first marriage, if they survived him, and after his second marriage, continued to pay premiums thereon from community funds of the second marriage without intent to defraud the wife, and without changing the beneficiaries, the wife could not recover any of the premiums paid or proceeds of the policy.

NOTE.

The first case was by the Court of Appeals for the Second District and the second case was by the Court of Appeals for the Sixth District neither of which has ever been passed upon by the Supreme Court. However the Supreme Court in the case of *Martin v. McAllister*, 94 T. 567 (63 S. W. 624), supports the rule announced in the last case for it says:

"The use by the husband of community funds in procuring insurance for his benefit on the life of the wife will not make the proceeds of the policy on her death community property, in the absence of fraud."

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It appears to be well settled in this State that an insurance policy on the husband's life payable to the wife and with premiums paid from community funds, makes the proceeds her separate property. *Evans v. Opperman*, 76 T. 283 (13 S. W. 312); *Washington Life Ins. Co. v. Gooding*, 49 S. W. 123 (19 C. A. 490). It forms no part of the estate of the husband or of the community, but upon the death of the insured passes to the wife's separate use. *White v. White*, 32 S. W. 48 (11 C. A. 113):

§ 141. McDonald v. Denton, 132 S. W. 823 (C. A.).

An ordinance of a city authorizing the officers to segregate or confine to certain limits disorderly houses and other businesses that are in violation of the statute law is unconstitutional and void as being in effect a suspension of the law against said businesses within the allotted district.

CONTRA: *Hatcher v. City of Dallas*, 133 S. W. 914 (C. A.).

Such an ordinance is not a suspension of the law against businesses, because no immunity is provided, and therefore such ordinances are valid.

NOTE.

The great weight of authority is with the *McDonald* case, and in *Brown Cracker Co. v. Dallas*, 137 S. W. 342 (T.), the Supreme Court upheld the view that such ordinances are unconstitutional and void. It would seem therefore that *Hatcher v. Dallas* is overruled.

§ 142. McDonald v. Mabree, 135 S. W. 1089.

There is no jurisdiction to render a personal judgment against one absent from the state after service of notice by publication, though the defendant is a citizen of the state.

CONTRA: *Fernandez v. Casey*, 77 T. 452 (14 S. W. 149).

A personal judgment on service by publication against a resident of Texas, who is temporarily absent at the time the publication is made, is valid.

NOTE.

The first case is by the Court of Civil Appeals for the Sixth District, but does not appear to have been reviewed by the Supreme Court. The case briefly stated is as follows: McDonald sued Mabee on a note for \$300.00, at the time of the institution of the suit the defendant was a resident of Texas but was then temporarily out of the state. He was regularly served with citation by publication, upon which judgment was rendered against him in favor of plaintiff for the amount sued for. In a second suit between the same parties the question arose as to the validity of the judgment thus obtained. The trial court holding the judgment was valid, which upon appeal was by the Court of Civil Appeals reversed; that court holding in substance, that as the defendant was absent from the state at the time he was sued by publication and had never entered an appearance, even though a citizen of the state, the court was without power to render a personal judgment, because the laws of the state and constructive service of citation made by virtue thereof can have no force or effect beyond the limits of the state. This opinion was rendered by a divided court, Associate Justice Hodges dissenting.

The Fernandez case is by the Supreme Court and the facts are as follows: A judgment had been rendered in the district court against Fernandez & Ackerman on service by publication after both of them had left the state. Neither of them was ever served with any other process, and neither entered his appearance in the suit. The record shows that Ackerman left the state for the purpose of taking up his residence elsewhere, and did so; but that Fernandez only traveled around through another state for about six months, and then returned to Texas. A personal judgment was rendered against Fernandez upon that service; thereafter an execution was issued and levied upon real estate belonging to him, and he sought by an application for a writ of injunction to restrain the sale, upon the ground that the judgment was invalid, because at the time of its rendition he was absent from the state and had never been personally served, nor had he entered his appearance in the suit. The trial court held the judgment valid, which on appeal was affirmed by the Supreme Court saying:

"The facts we think clearly show that Fernandez was a resident citizen of the State of Texas, and that though he was temporarily absent from the State he had never acquired a domicile elsewhere. Under these circumstances we think that service by publication of process against him according to the provisions of our statutes conferred upon the Justice Court the jurisdiction that it exercised in rendering judgment against him."

Northcraft v. Oliver, 74 T. 162 (11 S. W. 1121), appears to support the *Fernandez* case for the court says:

"The rule that service by publication does not confer jurisdiction will not be extended beyond the doctrine announced in *Pennoyer v. Neff*, 95 U. S. 714. Such service upon citizens of Texas made in pursuance of the statute of Texas is binding."

In *Horst v. Lightfoot*, 132 S. W. 761, by the Supreme Court, inferentially the *Fernandez* case is sustained, the court using the following language:

"The allegation of the petition that the defendant was absent from the state, by itself, would not be inconsistent with the existence of power in the court to reach him with its writ, since one may be absent from the state and yet be a citizen and resident in it, and therefore amenable to the process of its courts."

The *Fernandez* case and those following it predicate the rule which they announce upon the fact that when one becomes a citizen of a state, recognizes its sovereignty and claims its protection, the corresponding duty is imposed on him to obey its laws enacted for the protection of his life, liberty and property, and if those laws prescribe the manner of service upon him while beyond the limits of the state, he cannot be heard to complain, even tho the same law might be invalid as against a citizen of another state.

The Supreme Court of the United States in case of *Pennoyer v. Neff*, holds that a state has no power by statute to make valid service upon a non-resident beyond the limits of the state, altho that same court in that and other cases hold that a state has a right to declare what character of service shall be sufficient in any case in which judgment is sought against one of its citizens. Hence it follows that the *Pennoyer* case is not opposed to the rule announced in the *Fernandez* case; on the contrary they are in perfect accord.

The following foreign authorities hold with the *Fernandez* case: *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782; *Re Denick*, 92 Hun 161, 36 N. Y. Sup. 518; *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 343, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Beard v. Beard*, 21 Ind. 321; *McRae v. Matton*, 13 Pick. 53; *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551.

From what has already been said it will be seen that there is a sharp conflict between the *McDonald* and *Fernandez* cases, and the former must be considered as impliedly overruled leaving the law in this state thus: If a defendant when sued in this state is a

resident citizen of this state and is temporarily absent therefrom, he may be cited either by publication or personal service under the statute, upon which a valid personal judgment may be rendered, provided the record upon its face shows that he was a citizen of the state at the time the suit was brought and temporarily absent from the state at the time service was had. If the defendant, however, at the date of the institution of the suit was not in fact a resident of the state, the recital in the judgment that he was, is not conclusive upon him, on the contrary he may plead and prove that he was in fact a non-resident of the state at the date of the institution of the suit, and in that event the judgment will be held void. For kindred conflicts, see King's Conflicting Cases, Vol. 1, Sec. 105; Vol. 2, Sec. 17, 44, 53, 147, 257, 319, 485, 537.

§ 143. McIntire v. Lucker, 77 T. 259 (13 S. W. 1077).

Under the articles of the statutes providing for the laying out of public road and highways (old articles 4359 et seq., new articles 4670 et seq.). The general authority given the County Commissioners upon their own motion to lay out public roads is qualified by the term "as hereinafter prescribed," and the court can not lay out such roads, without a jury of view, nor can they change the report of the jury and therefore as the statutes require a written notice of the intention to have a jury of view lay out a road, in the absence of this written notice, the land owner is not party to the proceedings and hence cannot appeal, therefore a writ of injunction would lie against the County Commissioners to prevent the laying out of the road as changed.

CONTRA: Howe v. Rose, 80 S. W. 1019 (35 C. A. 328).

Under the Constitution and statutes the County Commissioners have full power to lay out roads upon their own motion, and they have discretion in accepting or changing the report of the jury of view. The qualification or limitation in the statute "as herein after prescribed" applies alone to the discontinuance or alternation of a road already established. Therefore even though a party has not been served with written notice, if he has notice of the proceedings; he may appeal from

the order of the Commissioner and hence can not by an original suit enjoin the County Commissioners from opening a road.

NOTE.

See Sec. 47, *Cummings v. Kendall County*.

§ 144. *McLaury v. Miller*, 64 T. 381.

Sound policy and good morals require that a purchase at execution sale, made by the attorney of the judgment creditor, should be set aside whenever its cancellation is sought by the debtor, who offers to return purchase money with interest, unless it appears that the sale was fairly made and for a fair price.

QUESTIONED: *Douglass v. Blount*, 95 T. 369 (67 S. W. 484).
58 L. R. A. 699.

We have found no case in which, at the instance of the defendant, it has been held that a sale under judicial process was void because the purchaser was the attorney for the plaintiff in a writ, unless the circumstances impeached the fairness of the transaction.

NOTE.

The questioned case is by the Supreme Court, Judge Stayton delivering the opinion. He undoubtedly holds that the judgment defendant who tenders the purchase money to the plaintiff's attorney who buys at execution sale is entitled to have the sale set aside. Yet this holding was not necessary to the decision, for it appears from the report of the case that the grossly inadequate price bid by the attorney coupled with the facts and circumstances surrounding the sale, made it fraudulent. The questioned case is also by the Supreme Court, Judge Brown delivering the opinion. He recognizes the conflict but at the same time calls attention to the dicta in the *McLaury* case. The Supreme Court in the case of *Beall v. Chatham*, 100 T. 371 (99 S. W. 1118), follows and approves the ruling in the *Douglas* case, the court saying:

"We reached the conclusion that a purchase by an attorney at a sale under process controlled by him, was not necessarily void but might be set aside and would be subject to critical examination by the courts."

CONFLICTING CASES. [§§ 145, 146

In the case of *Ross v. Drouilhet*, 80 S. W. 241 (34 C. A. 327), by the Court of Civil Appeals for the First District it is said, "The authorities on the question of the right of an attorney to bid at the execution sale of his client are reviewed, and the law upon the point clearly settled in *Douglas v. Blount*."

From the weight of authorities as above cited it can be safely said, an attorney representing the plaintiff in execution while keeping good faith with his client can purchase at execution the property of the judgment defendant, and the sale can not be set aside on tendering him the amount of his bid, in the absence of such facts as would authorize its cancellation when it was bid in by his client.

§ 145. *McQueen v. Fulgham*, 27 T. 464.

Spoken words which impute to a female want of chastity are not actionable per se, and without proof of special damages, there can be no recovery.

CONTRA: (Overruled) *Hatcher v. Rangel*, 81 S. W. 289 (98 T. 85).

Under the law as it now exists in this State, words spoken or written which "falsely and maliciously" or "falsely and wantonly" impute to a female a want of chastity are actionable, without showing special damages arising therefrom.

NOTE.

See Sec. 135, *Linney v. Maton*.

§ 146. *Medlin v. Wilkins*, 20 S. W. 1026 (1 C. A. 465).

It is error to admit in evidence, admissions contained in an abandoned pleading.

OVERRULED: *Houston, E. & W. T. Ry. Co. v. De Walt*, 96 T. 126 (70 S. W. 531, 97 A. S. R. 877n).

Pleadings, though superseded by amendment, may be given in evidence against the pleader, of any facts distinctly alleged therein.

NOTE.

The overruled case is by the Commission of Appeals, and the overruling case is by the Supreme Court. The following are in accord with the overruled case and are also overruled: *Southern P. Co. v. Willington*, 36 S. W. 1114; *Texas & P. Ry. Co. v. Reed*, 32 S. W. 120; *Thompson Elec. Co. v. Berg*, 30 S. W. 455 (10 C. A. 200); *King's Conflicting Cases*, Vol. 2, Sec. 434, 471, 481. Associate Justice Jenkins of the Court of Civil Appeals for the Third District in the case of *Lantry S. C. Co. v. McCracken*, 134 S. W. 363, says:

"The authorities are in hopeless conflict as to whether or not a statement in an abandoned pleading, not signed or sworn to by the party himself, is admissible in evidence."

There are numerous other conflicts in addition to the one mentioned by Judge Jenkins. Some of the cases holding that in no case are such pleadings admissible in evidence, whether abandoned or not. While a great majority hold to the contrary. *Cameron v. Reamuto*, 100 S. W. 195 (45 C. A. 307); *Scott v. Woodward*, 88 S. W. 407 (39 C. A. 499); *Wildy Lodge v. City of Paris*, 81 S. W. 101 (C. A.); *Texas Ry. Co. v. Coggin*, 77 S. W. 1054 (33 C. A. 669); *Barrett v. Featherstone*, 89 T. 567 (35 S. W. 11, 36 S. W. 245); *Goodbar Shoe Co. v. Simms*, 43 S. W. 1066 (C. A.); *Galveston Ry. Co. v. Eckles*, 54 S. W. 651 (C. A.); *Wright v. U. S. Mortgage Co.*, 54 S. W. 369 (C. A.); *Jourdan v. Young*, 56 S. W. 762 (C. A.); *Lyon v. Dutton*, 38 S. W. 546 (C. A.); *San Antonio Ry. Co. v. Choate*, 56 S. W. 215 (22 C. A. 619); *Morgan v. Bement*, 59 S. W. 910 (24 C. A. 568); *First National Bank v. Watson*, 66 S. W. 234 (C. A.); *Felton v. Rally*, 72 S. W. 614; *Prouty v. Musquiz*, 59 S. W. 568; *Coles v. Perry*, 7 T. 143; *Muller v. Hoyt*, 14 T. 51; *Coats v. Elliott*, 23 T. 613; *Duncan v. Magette*, 25 T. 249; *Burleson v. Goodman*, 32 T. 230; *Cook v. Hughes*, 37 T. 345; *Davis v. Roosevelt*, 53 T. 317; *Wheeler v. Styles*, 28 T. 246; *Buzard v. McAnulty*, 77 T. 445 (14 S. W. 138); *Bradford v. Knowles*, 78 T. 116 (14 S. W. 307); *Hynes v. Packard*, 92 T. 50 (45 S. W. 562); *International Ry. Co. v. Milliken*, 32 S. W. 152 (10 C. A. 665). *Walter v. Parker*, 19 S. W. 1022; *McGregor v. Sims*, 44 S. W. 1021; *Crosby v. Bonnosky*, 69 S. W. 212 (29 C. A. 455); *Wren v. Howland*, 75 S. W. 894 (33 C. A. 87); *Selligman v. Greif*, 109 S. W. 214 (C. A.); *Colorado C. Co. v. McFerland*, 109 S. W. 435 (50 C. A. 92); *Wilkins v. Clawson*, 110 S. W. 103 (50 C. A. 82); *Slayden v. Palmo*, 117 S. W. 1054 (C. A.); *Pecos & N. T. Ry. Co. v. Blasengame*, 93 S. W. 187 (42 C. A. 66); *Miller v. Drought*, 102 S. W. 145 (C. A.); *Ornage R. M. Co. v. McIlhinney*, 77 S. W. 428 (33 C. A. 592); *Galloway v. San Antonio & G. Ry. Co.*, 78 S. W. 32 (C. A.); *Daniels v. Stewart*, 132 S. W. 967.

The scope of this work will not permit of even a brief statement of the holdings in all of the above cases wherein the questions in conflict are discussed. However, by a careful examination of them, giving the Supreme Courts opinions paramount importance, the following principles appear to be established by the great weight of authority.

Distinct admissions of particular facts contained in an abandoned pleading may be used in evidence against the pleader by the adverse party, altho the pleading is neither verified nor signed by the party, but is only signed by his counsel.

The verification of pleading only goes to the weight of the admissions therein contained and not to its admissibility. While not conclusive against the party, but may be considered like any other evidence offered and is open to explanation or contradiction like other admissions.

When the pleading is signed by counsel in behalf of the party, the admissions therein are *prima facie* authorized by him and admissible against him. Altho evidence is admissible tending to show that the pleading was drawn by the attorney upon a misunderstanding of the facts or not by the authority of the client.

The withdrawal of an admission in a pleading by abandonment or amendment, does not destroy its competency, altho when offered it is proper for the party who has made the admission to show the withdrawal, and all the attendant circumstances for the purpose of determining the weight to be attached to the admission but not for the purpose of destroying its competency. In other words, the party whose admissions are introduced may offer any evidence tending to prove that the admission was not deliberately but mistakenly made. Where the abandoned pleading contains a general denial and also a distinct admission of a particular fact, the effect of the admission is thereby destroyed and the pleading is not admissible.

In order for a party to take advantage of an admission in his adversary's abandoned pleading, he must offer it in evidence. This is neither necessary nor proper where the admission is contained in a pleading that has not been abandoned for the admission then becomes a matter of law. Admissions in abandoned pleadings of married women signed by their attorneys or minors signed by their next friends or their attorneys are not binding on them or admissible in evidence.

**§ 147. Missouri, K. & T. Ry. Co. v. Barnes, 95 S. W. 714
(42 C. A. 626).**

Where, in a personal injury action, the testimony on the issue of contributory negligence was conflicting, a requested charge that the jury should consider all the surrounding circumstances in evidence before determining the issue, was properly refused as a charge on the weight of the evidence.

CRITICISED: Missouri, K. & T. Ry. Co. v. Rothenberg, 131 S. W. 1157 (—C. A.—).

An instruction that, in determining the issue of contributory negligence, the jury may look to all the surrounding facts and circumstances in evidence, does not take from the jury the power to reject any testimony they may not credit, and does not invade the province of the jury.

NOTE.

The criticised case is by the Court of Civil Appeals for the Third District, and relies for its support on *Railway Co. v. Runnels*, 92 T. 305 (47 S. W. 971); *Dwyer v. Bassett*, 63 T. 277; *Wills v. Whittitt*, 67 T. 677 (4 S. W. 253); *Davidson v. Wallingford*, 88 T. 624 (32 S. W. 1030); an examination of those cases will show that they do not fully support the principle for which they are cited.

The criticising case is by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court. Associate Justice Fly speaking of the criticised case, says:

"We do not know what the exact language of the charge in that case was, but the court stated that it "enjoined upon the jury the duty of considering all the surrounding facts in evidence before they could determine whether or not appellee was guilty of contributory negligence," and the court held that it compelled the jury to consider all the testimony whether they believed it or not. With due deference to the opinion of that court, it may be said that the force of its reasoning in connection with the charge does not appeal to us. The charge to consider all the facts and circumstances does not take away from the jury the power of rejection of any testimony they might not credit, and it is scarcely conceivable that an average jury would necessarily be compelled to consider any testimony they might desire to reject in order to ascertain whether it

should be rejected. It is the duty of every jury to consider each fact and circumstance in evidence before them, and then give to it whatever weight they may desire."

He cites in support of the principle announced the case of *San Antonio Ry. Co. v. Lester*, 99 T. 220 (89 S. W. 752); wherein the following charge was approved as not being on the weight of the evidence, but objectionable because in a negative form:

"In determining the issue of plaintiff's contributory negligence you may look to all the surrounding facts and circumstances in evidence before you, and determine therefrom whether or not the plaintiff used such care as a person of ordinary prudence would have used under the same or similar circumstances."

The following, more or less, discuss the question in conflict: *Ft. Worth Ry. Co. v. Osborne*, 26 S. W. 274; *Galveston Ry. Co. v. Knippa*, 27 S. W. 731.

**§ 148. Missouri, K. & T. Ry. Co. v. Belcher, 89 T. 428
(35 S. W. 6).**

In order to recover special damages from a carrier for delay in transportation, such as depreciation in value of cattle for want of food shipped to feed them, the plaintiff must show that at the date of contract defendant had notice of the special conditions rendering such damages the natural and probable result of breach of his contract, under circumstances showing that the contract was to some extent based upon or made with reference to such conditions.

MODIFIED: *Bourland v. Choctaw, O. & G. Ry. Co.*, 99 T. 407 (90 S. W. 483; 122 A. S. R. 647; 3 L. R. A. [N. S.] 111n).

The rule requiring notice, at the time of making a contract for the carriage of property, of the existence of peculiar conditions under which special damages are likely to arise from its breach, as essential to create liability of the promisor for such damage is not a rigid or universal one, nor applicable to all cases in which such damages are sought; and where a carrier after having transported cotton seed cake to its desti-

nation for shipper who was there feeding stock, was then first notified that the shipper was out of any other provision for his cattle and could not obtain other provision, and that the prompt delivery was necessary to save him from serious loss on his cattle, and thereafter the carrier negligently failed to make the delivery, such notice was sufficient to render the carrier liable for damages, for the negligent delay in making delivery of the food, occurring after such notice was received.

NOTE.

Ever since the English case of *Hadley v. Baxendall*, 9 Exch. 341, (see Field on the Law of Damages, Sec. 252), the doctrine announced in the *Belcher* case has been the general rule of law in both England and America.

It is true that from time to time there has been an intimation that special circumstances might arise that would render this rule inequitable, but in almost every case where such intimation was made the court ultimately concluded that in that particular case, the circumstance had not arisen to take it out of the general rule.

It is therefore very difficult to analyze the *Bourland* case, and deduce any definite rule, which could positively be asserted as an exception to the rule in the *Hadley v. Baxendall* case, and the innumerable cases following same including the *Belcher* case. Yet it can not be denied that the *Bourland* case was decided upon principles of equity and justice. It would seem therefore that no general rule can be formulated, but each case must be determined upon its own facts, the following points, however, should be observed for guidance, to-wit:

In the *Bourland* case: 1st: The goods had actually arrived at the point of destination and only delivery was necessary.

2nd: The goods being actually in the hands of the delivering carrier, could have been delivered at once but for negligence.

3rd: Similar goods could not be obtained at the point of delivery.

4th: Notice was given to the party who had the goods in hand at the point of delivery and while the goods were still in hand.

5th: Damages were only allowed for the delay in delivery after the notice was given.

The Supreme Court in the *Bourland* case cites the following cases as authority for its modification of the general doctrine: *Wells Fargo & Co. v. Battle*, 24 S. W. 353 (5 C. A. 532); *Rogan v. Wabash Ry. Co.*, 51 Mo. App. 667.

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**§ 149. Missouri K. & T. Ry. Co. v. Nelson, 87 S. W. 706
(39 C. A. 269).**

Revised Statutes 1895, Arts. 4497-4500 as amended by Acts of Legislature 1899, page 67, providing for penalties for failure to furnish cars upon written demand of shipper, are constitutional.

CONTRA: Houston & T. C. Ry. Co. v. Mayes, 201 U. S. 321 (26 S. C. 491).

See Sec. 110, H. & T. C. Ry. Co. v. Mayes.

**§ 150 Missouri K. & T. Ry. Co. v. Taft, 74 S. W. 89
(31 C. A. 657).**

Under Revised Statutes 1895, Art. 4507, requiring that the whistle on a locomotive shall be sounded 80 rods from a public crossing or the railroad shall be liable for damages sustained by reason of such negligence, the failure to so sound the whistle is negligence per se as to any one upon the tracks of said railway and relying upon the railway company to obey the statutory duty, even though they be not at or on the crossing.

CONTRA: Missouri, K. & T. Ry. Co. v. Saunders, 106 S. W. 321 (101 T. 255), (14 L. R. A. [N. S.] 998).

It is not negligence per se to fail to sound the whistle 80 rods from a public crossing as to a person upon the tracks, but not at or near the crossing, because such statute was passed with the idea of protecting those using the crossings of the railway. It is, therefore as to such person, error to charge that the failure to so sound the whistle is negligence. The fact that the whistle was not so sounded, might be submitted as any other fact as a circumstance from which the jury, under the facts of the particular case, might conclude that there was negligence.

NOTE.

In the Taff case a writ of error was refused by the Supreme Court, but as pointed out by Judge Williams in the Saunders case, this did not necessarily mean the approval of the doctrine announced in the syllabus (*supra*), because other uncontroverted facts undoubtedly showed negligence.

The Taff case has in its general doctrine been followed in a number of cases, to-wit: G. H. & H. R. Ry. Co. v. Levy, 79 S. W. 879 (35 C. A. 107); St. Louis S. W. Ry. Co. v. Kilman, 86 S. W. 1050 (39 C. A. 107); I. & G. N. Ry. Co. v. Tisdale, 87 S. W. 1058 (39 C. A. 372); H. & T. C. Ry. Co. v. O'Donnell, 90 S. W. 886 (C. A.), but an examination of these authorities with the exception of the Kilman case, will show that in reality the charge was not so framed as to peremptorily charge negligence, or negligence *per se*, and therefore while they cite the Taff case as authority, they are not necessarily in conflict with the Saunders case. The Kilman case, however, seems to follow the Taff case absolutely and must be considered to that extent as fully disapproved as is that case.

The question came squarely before the Supreme Court in the Saunders case above cited on writ of error from a decision of the Court of Civil Appeals (see M. K. & T. Ry. Co. v. Saunders, 103 S. W. 457 (C. A.), and its decision has been followed in the following cases, to-wit: Ft. Worth & E. C. Ry. Co. v. Poteet, 115 S. W. 883; Tex. C. Ry. Co. v. Horn, 115 S. W. 911; Ft. Worth & D. C. Ry. Co. v. Longino, 118 S. W. 198, and T. & N. O. Ry. Co. v. Bean, 119 S. W. 328 (writ of error refused by Supreme Court). So that it seems that the doctrine is firmly established upon the principles announced in the Saunders case.

§ 151. Missouri, K. & T. Ry. Co. v. Texas, 100 T. 420
(100 S. W. 766).

Under the Acts of the Legislature of April 17th, 1905, railroad companies are required to erect and maintain at their passenger depots water closets and that they shall be kept lighted at night and in a cleanly condition, held as the act failed to prescribe a time in which the water closets should be constructed and did not allow a reasonable time for doing the work, a penalty for failure to provide such structures was inoperative and void.

LIMITED: *Houston & T. C. Ry. Co. v. State*, 101 T. 333 (107 S. W. 525; 120 S. W. 1078).

Only so much of the act above mentioned as requires railways to provide water closets at passenger depots where none existed because a reasonable time for doing the work was not allowed is unconstitutional, and that portion of said act requiring water closets already in existence to be kept clean and lighted is constitutional and penalties for failure to comply therewith may be enforced. *M., K. & T. Ry. Co. v. State* (supra) is limited accordingly.

NOTE.

The original decision in *M. K. & T. Ry. Co. v. State*, is followed by: *Ft. Worth & Rio Grande Ry. Co. v. State*, 100 T. 425 (100 S. W. 768); *M. K. & T. Ry. Co. v. State*, 100 T. 426 (100 S. W. 768); *Southern Kansas Ry. Co. v. State*, 100 T. 437 (100 S. W. 1197).

And the principle announced is followed in *Beaumont Traction Co. v. State*, 122 S. W. 617. This case was where a traction company was required to screen the front end of its cars in certain months, but no time was fixed in which the necessary work could be done. The case is also cited with approval in *State v. T. & N. O. Ry. Co.*, 125 S. W. 53.

§ 152 *Missouri Pacific Ry. Co. v. Johnson*, 72 T. 95 (10 S. W. 325).

The right to have an examination made of one who sues for damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice.

OVERRULED as DICTA: *Austin & N. W. Ry. Co. v. Cluck*, 97 T. 172 (77 S. W. 403, 64 L. R. A. 494, 104 A. S. R. 863).

In a civil action for an injury to the person, the court, on application of the defendant has no legal right or power to order the plaintiff, without his or her consent, to submit to a physical examination as to the extent of the injury sued for,

but the fact that plaintiff has refused to submit to such examination is admissible in evidence as bearing on the credibility and sufficiency of the testimony on which he seeks to recover.

NOTE.

See Sec. 116, *I. & G. N. Ry. Co. v. Underwood*.

§ 153. *Missouri Pac. Ry. Co. v. Sherwood*, 84 T. 125 (19 S. W. 455, 17 L. R. A. 643n).

It is provided by Statute in Texas (Sayles Civ. Stat., Art. 320), that railway companies and other public carriers shall not limit or restrict their liability as it exists at common law, held, that the statute applies only to shipments beginning and ending in Texas, and not to shipments beginning, but to be concluded in another State.

CONTRA: *Armstrong v. Galveston, H. & S. A. Ry. Co.*, 92 T. 117 (46 S. W. 33).

The Statutes of Texas forbidding any railway company or other public carrier limiting or restraining its common law liability applies as well to a shipment beginning in Texas, and ending in another State or country as it does to a purely intra-state shipment. It is not an attempt to regulate interstate commerce. It is merely a prohibition of what the Legislature deems unreasonable restrictions upon the remedy for a breach of contract.

NOTE.

The question presented by this conflict had been several times before the Supreme Court, in the following cases: *Ryan v. Railway Co.*, 65 T. 13, Am. Rep. 57, p. 589; *Railway Co. v. Harris*, 67 T. 166 (25 S. W. 574); *Railway Co. v. China Mfg. Co.*, 79 T. 26 (14 S. W. 785); but as was said in the *Sherwood* case was not necessary to be decided.

The *Sherwood* decision was followed by the following: *M. P. Ry. Co. v. International Marine Ins. Co.*, 84 T. 149 (19 S. W. 459); this case was by the Commission of Appeals, but approved by the Supreme Court; also by *M. P. Ry. Co. v. Gernan*, 84 T. 141 (19 S.

W. 461), by the Commission of Appeals and approved by the Supreme Court.

In the case of *T. & P. Ry. Co. v. Clark*, 23 S. W. 698 (4 C. A. 611), the shipment was from out of the State into Texas, and the court held that the principle announced in the *Sherwood* case, applied, that is, that it was an interstate shipment, and an overcharge of freight by the Texas line would have to be settled by the Interstate Commerce Commission and not by the Texas courts. Thus it will be seen that the case is not strictly in point, although the doctrine in the *Sherwood* case is approved.

In the suit of *Wright v. Howe*, 24 S. W. 314 (C. A.), the *Sherwood* case is cited as authority for the broad proposition that in interstate shipments our statutes do not apply.

In *Ft. Worth & D. C. Ry. Co. v. Whithead*, 26 S. W. 172 (6 C. A. 595), the court cites the *Sherwood* case, but distinguishes the cases upon the facts. Likewise in *Houston & T. C. Ry. Co. v. Davis*, 31 S. W. 308 (11 C. A. 24), while the court cites the *Sherwood* case, it holds that in that particular case, the shipment was not an interstate shipment.

The question again came squarely before the Supreme Court in the case of *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 T. 1 (32 S. W. 889, 30 L. R. A. 713, 59 A. S. R. 17), and the doctrine announced in the *Sherwood* case was approved.

In *S. P. Co. v. Phillipson*, 39 S. W. 958 (C. A.), the court cites the *Sherwood* case, but holds the particular contract void as being unreasonable. That is, not that the statute made it void, because according to the doctrine in the *Sherwood* case, the statute did not apply, but it was void because unreasonable, independently of any statute.

In *G. H. & S. A. Ry. Co. v. Armstrong*, 43 S. W. 614 (C. A.), the court followed the doctrine announced in the *Sherwood* case. The Supreme Court granted a writ of error, and after a lengthy discussion, basing its opinion upon the case of *Railway Co. v. Solan*, 169 U. S. 133 (18 Sup. Ct. 289, 42 L. Ed. 688), without even mentioning the *Sherwood* or the *Houston Direct Nav. Co.* cases, practically overrules them and reversed the Court of Civil Appeals. And in so doing refers to the older case of *Railway Co. v. Dwyer*, 75 T. 572 (12 S. W. 1001), as being in line with the *Solan* case and authority for its decision in the *Armstrong* case.

In *Mexican Nat. Ry. Co. v. Ware*, 60 S. W. 343 (C. A.), the Court of Civil Appeals for the Fourth Supreme Judicial District, which court had originally decided the *Armstrong* case, upon the authority of the *Sherwood* and *Houston Direct Nav. Co.* cases, although following the Supreme Court in the *Armstrong* case, takes occasion, and we think very properly, to comment upon the fact that the Supreme

Court does not even mention the *Sherwood* and *Houston Direct Nav. Co.* cases, but goes back to the *Dwyer* case which one would naturally conclude had been overruled by those cases.

The Fourth Court of Civil Appeals had the right to feel that they had been led into error by the Supreme Court by the two decisions, because when the *Armstrong* case was before it upon first hearing (see 29 S. W. 1117), it had clearly indicated its belief in the doctrine finally announced by the Supreme Court in that same case.

Texas & P. Ry. Co. v. Walker, 60 S. W. 796 (25 C. A. 216), and *Texas & P. Ry. Co. v. Richmond*, 61 S. W. 410 (C. A.), follow the *Armstrong* case, but when this last case, to-wit, *T. & P. Ry. Co. v. Richmond*, 94 T. 571 (63 S. W. 619), went to the Supreme Court on writ of error, it was held not only that in the particular case the statute did not apply, but inclination was shown to return to the doctrine in the *Sherwood* case, and hold that it did not apply to any interstate shipments.

In *State v. I. & G. N. Ry. Co.*, 71 S. W. 994 (31 C. A. 219), the *Sherwood* case is approved upon the point of what constituted an interstate shipment, but whether the statute applied to such shipments was not involved or decided.

Again in *White v. St. L. S. W. Ry. Co.*, 86 S. W. 962 (C. A.), the *Sherwood* case is cited, but held not to apply to the particular facts of that case.

In *G. H. & S. A. Ry. Co. v. Fales*, 77 S. W. 234 (33 C. A. 457), the question again came before the Court of Civil Appeals for the Fourth Supreme Judicial District. The Court followed the Supreme Court in the *Armstrong* case, namely, that the statute applies to interstate as well as state shipments, and as authority for so holding in addition to the authorities heretofore cited, refers to: *Railway v. Carter*, 29 S. W. 565, 9 C. A. 677; *Railway v. Withers*, 40 S. W. 1073 (16 C. A. 506); and *Railway v. Eddins*, 26 S. W. 162 (7 C. A. 116), but makes no mention of the *Sherwood* or *Houston Direct Nav. Co.* cases. The Supreme Court refused a writ of error in this case, and it seems to be the latest expression upon the direct point. And in this case is the best discussion we have seen on the subject.

Returning, however, to another line of decisions, we find the case of *G. C. & S. F. Ry. Co. v. Vaughan*, 16 S. W. 775, in which it is held that where on a bill of lading for the transportation from Talpa, Texas, to Ft. Worth, Texas, thence to be delivered to its connecting lines for transportation to Chicago the carrier could not lawfully contract against negligence occurring beyond its own line. This case was expressly disapproved by the Supreme Court in *McCarn v. I. & G. N. Ry. Co.*, 84 T. 352 (19 S. W. 547), where it was held that where cattle are shipped upon a bill of lading providing

for the transportation from San Antonio, Texas, to Chicago, and stipulating against liability for negligence except that occurring upon its own line, such stipulation is legal and will be enforced by the courts.

The reasoning in the Vaughan case is followed in *Railway v. Allison*, 59 T. 193. But the McCarn case has been followed by a long line of decisions, to-wit: *I. & G. N. Ry. Co. v. Mahula*, 20 S. W. 1002 (1 C. A. 182); *G. C. & S. F. Ry. Co. v. Thompson*, 21 S. W. 186 (C. A.); *G. C. & S. F. Ry. Co. v. Williams*, 23 S. W. 626 (4 C. A. 294); *G. W. T. & P. Ry. Co. v. Griffith*, 24 S. W. 362 (C. A.); *T. & P. Ry. Co. v. Smith*, 24 S. W. 565 (C. A.); *Wichita Val. Ry. Co. v. Swenson*, 25 S. W. 47 (C. A.); *G. H. & S. A. Ry. Co. v. Short*, 25 S. W. 142 (C. A.); *G. C. & S. F. Ry. Co. v. Wilbanks*, 27 S. W. 302 (7 C. A. 489); *T. & P. Ry. Co. v. Hawkins*, 30 S. W. 1113 (C. A.); *T. & N. O. Ry. Co. v. Gray*, 99 S. W. 1126 (45 C. A. 208); *H. & T. C. Ry. Co. v. Groves*, 106 S. W. 416 (C. A.); *Clark v. G. H. & S. A. Ry. Co.*, 137 S. W. 716 (C. A.).

How these cases can be harmonized with the decision in the *Armstrong* case we can not see, unless it be said that a carrier is not bound to contract for carrying goods beyond its own line, but may contract for the carriage of goods and delivery to the next line, and it is upon this that all the decisions following the McCarn case seem to be based. It does not, however, answer the question, suppose the carrier does contract to carry goods to a place beyond its own line and into another state, can he then limit his liability as it existed at common law or not? If he can, then the *Sherwood* case is the correct law, if he cannot then the *Armstrong* case is correct.

The fact that the carrier avoids the question, by only contracting to carry to the next connecting carrier and to deliver to such carrier to be delivered at the point of destination which is outside of the State, was expressly decided in the *Sherwood* case to make it an interstate shipment, and the carrier could limit his liability. In the *Armstrong* case the *Sherwood* case is followed in so far as such a shipment is declared to be an interstate shipment, but that case declared the carrier could not limit its liability. In fact the cases on this important point are so confusing and conflicting, that it would be a great benefit to the profession should a case be carried to the Supreme Court, of such a nature, that that eminent and learned Court could without departure from its rules, analyze the various decisions and clear up the clouds now surrounding the question.

For discussion of a kindred question, see *King's Conflicting Cases*, Vol. 2, Sec. 344 and 399.

§ 154. *Mitchell v. Nix*, 1 Posey 127.

As the head of the family the husband has the right to select the domicile; but as a pre-emptor, he has no vested right in vacant land settled upon by him, until he has lived on it the length of time required by law to obtain a patent, and he may sell or make agreements concerning it without being joined by his wife.

CONTRA: *Creamer v. Briscoe*, 101 T. 490 (109 S. W. 911), 130 A. S. R. 869, 17 L. R. A. [N. S.] 154n).

See Sec. 260, *Votaw v. Pettigrew*.

§ 155. *Monghon v. Van Zant County*, 3 W. & W., Sec. 198.

Where a physician is employed by the county judge and one of the county commissioners to attend a pauper who is dangerously sick, held, that it being the duty of the county to provide for the support of paupers it thereby became liable for the reasonable value of the services so rendered.

OVERRULED: *Fear v. Nacogdoches*, 71 T. 337 (9 S. W. 265).

See Sec. 189, *Rutherford v. Harris County*.

§ 156. *Moore v. Glass*, 25 S. W. 129 (6 C. A. 368).

When a vendor of a tract of land assigns a vendor's lien note, without at the same time conveying or transferring the superior title, the superior title which had been held by him is extinguished, and the assignee of the note cannot, after the note becomes barred by limitation, purchase the superior title from the vendor, or recover the land from the vendee by reason of any such superior title.

CONTRA: *Abernethy v. Bass*, 29 S. W. 398 (9 C. A. 239).

Where a vendor who received a note for part of the price, wherein a lien was reserved, assigns the note and guarantees

its payment, and after default, in consideration of his being released from his guaranty, conveys the land to the assignee, the latter acquires title as against the maker of the note, though at the time of the deed to such assignee the note was barred by the statute of limitations.

NOTE.

The first case is by the Court of Civil Appeals for the Third District, but never reached the Supreme Court. The second case is by the Court of Civil Appeals for the Fourth District in which a writ of error was denied by the Supreme Court.

The case of *White v. Cole*, 87 T. 500 (29 S. W. 759), by the Supreme Court was where a vendor assigned a note executed for part of purchase money. Subsequently, and after the note had been barred by limitation, the vendor conveyed the land to the holder of the note. Suit was brought on the note and to foreclose the lien. The defendant pleaded limitation. The plaintiff amended by substituting an action in trespass to try title for recovery of the land. Defendant pleaded not guilty. Held: "That the superior title vested by the transfer made by the original vendor in the holder of the note, notwithstanding it was not made at date of the transfer of the note, and that the note was barred by limitation at date of the conveyance."

The principle above announced is in accord with the Supreme Court's decision in *Hamblen v. Folts*, 70 T. 132 (7 S. W. 834).

In the cases of *Johnson v. Lockhart*, 40 S. W. 640 (16 C. A. 32); *Ellis v. Hannay*, 64 S. W. 684; *Dittman v. Iselt*, 52 S. W. 96; *Smith v. Cottingham*, 49 S. W. 145 (20 C. A. 303); *Davis v. Hurtman*, 48 S. W. 50 (19 C. A. 442); it is held, that the transfer of the superior title by a vendor to the assignee of the purchase money notes, altho made after the notes are barred, vests the legal title in the assignee, who can recover the land notwithstanding the purchase money notes are barred.

Thus it will be seen that the rule announced in *Moore v. Glass*, to the effect that the superior title held by the vendor becomes extinguished when the vendor's lien note is barred in the hands of the assignee, and the assignee who thereafter acquired the superior title cannot recover the land, is in direct conflict with the decisions above given and must be considered overruled, if not expressly at least by implication.

For conflict upon the question as to whether the vendor can be required by suit to convey the superior title to the assignee of the vendor's lien note after same is barred by limitation, see *King's Conflicting Cases*, Vol. 2, Sec. 108.

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§ 157. Mulhaul v. Fuller, 1 W. & W. Civ. Cases, Sec. 1162.

When the jurisdiction of the court depends upon the amount in controversy, the safe rule is to depend upon the amount of the judgment prayed for.

CONTRA: Times Publishing Co. v. Hill, 81 S. W. 806 (36 C. A. 389).

See Sec. 3, Alexander v. Thompson.

§ 158. Nelson v. Bridge, 98 T. 523 (86 S. W. 7).

An application for administration filed after four years "shall be refused and dismissed" Revised Statutes (Art. 1880), is not an affirmative declaration that the court shall not have jurisdiction after four years, nor that an administration granted after that time shall be void. All that the theory of nullity rests upon is the positive and mandatory language of the statute, and this, in our opinion, is addressed to the probate court to control its action in the exercise of its jurisdiction, and is not a denial of the jurisdiction. The strong character of the language used cannot be regarded as having the latter effect, because the same statute abounds with like verbiage plainly intended not as jurisdictional restrictions, but as rules prescribed to guide and control the court in its proceedings.

CONTRA: Rogers v. Watson, 81 T. 403 (17 S. W. 29).

According to the allegations of the petition at the time of the sale more than four years had elapsed from the date of the decedent's death and no administration had ever been had upon his estate. Under the statute (Art. 1880), as it then existed and now exists, after the lapse of four years after the death of a person, the probate court lost its power to grant letters of administration upon his estate.

NOTE.

Both of the above cases are by the Supreme Court. The act of 1848 did not prescribe any time within which administration should

be opened, but the act of 1870 fixed the period at four years from death. *Martin v. Robinson*, 67 T. 368. This was followed by the act of 1876 (art. 1880), which reads as follows:

"All applications for the grant of letters testamentary or (of) administration upon an estate must be filed within four years after the death of the testator or intestate, and if four years have elapsed between the death of such testator or intestate and the filing of such application, such application shall be refused and dismissed."

The following cases passed upon the question in conflict under the Act of 1848: *Blair v. Cisnerso*, 10 T. 35, administration opened after sixteen years void and could be attached collaterally; *Cochran v. Thompson*, 18 T. 656, grant of administration after fourteen years should be regarded as nullity; *Duncan v. Teal*, 49 T. 603, opening administration after fourteen years, held void on presumption that no debts existed; *Paul v. Willis*, 69 T. 261, 7 S. W. 357, after lapse of ten years in absence of showing of debts administration void; *Lynne v. Sanford*, 19 S. W. 847; *Martin v. Robinson*, 67 T. 375 (3 S. W. 550); *Flenner v. Walker*, 23 S. W. 1032 (5 C. A. 145); *Saul v. Frame*, 22 S. W. 984 (3 C. A. 596); *Shirley v. Warfield*, 34 S. W. 392 (12 C. A. 449); though ten years have elapsed since death could not be collaterally attacked. *Harwood v. Wylie*, 70 T. 542 (7 S. W. 789), held:

"There ought to be some limit of time after death when administration should be taken out, even in the absence of statute, but notes the fact that the statute has since been passed limiting the time to four years, as indicating the policy to be pursued thereafter."

In *Francis v. Hall*, 13 T. 193; *Templeton v. Land Co.*, 77 T. 58 (13 S. W. 964); and *Postum Co. v. Boon*, 11 S. W. 544, following *Martin v. Robinson*, holding in absence of the statute, no arbitrary rule can be fixed but issuance of letters after a long period of time from death, the proceedings are void on collateral attack.

The only case other than the two in conflict which attempt to construe the acts of 1870 and 1876 is *Henry v. Roe*, 83 T. 450 (18 S. W. 806), where decedent died in 1883 and his widow qualified as administratrix in 1890, held that the statute limiting the time for taking out letters relates to original actions seeking letters and the court is not prepared to say that taking out letters after that time was absolutely void, so that it could be attacked collaterally. In *Simpkins on Administration* the holding of the court in *Nelson v. Bridge* is criticised by the eminent text writer wherein he says:

"The reasoning of the court in *Nelson v. Bridge* is not convincing, that when the Legislature says that an application for

administration filed after four years 'shall be refused and dismissed,' it carries with it no more than a simple rule of guidance which may or may not be followed at the will of the court; that the court should in this language see a discretion to be exercised rather than limitation of power to be heeded seems extraordinary. Courts should not hold an administration valid even in collateral attack when obtained by methods violative of express law."

In some of the cases cited above it is held that the taking out of letters of administration after the time fixed by the statute, the proceedings had thereunder are nullities but cannot be collaterally attacked, this appears to be violative of the general rule that where a proceeding is a nullity for want of jurisdiction of the parties or the subject-matter, its invalidity may be asserted directly or collaterally, on the other hand if the proceedings be merely voidable and not void then it can only be attacked in a suit brought for that purpose.

§ 159. New Birmingham Iron & Land Co. v. Blevin, 34 S. W. 826 (12 C. A. 410).

The language of the statute, Art. 1383, providing for an appeal from an interlocutory order is, "Provided said appeal be taken within twenty days from the entry of said order." This we construe to mean the entry upon the minutes of the court. There is no other entry required or contemplated by the law.

CONTRA: Farwell v. Babcock, 65 S. W. 509 (27 C. A. 162).

We think the appeal was properly taken when the order appointing the receivers was filed with the clerk, notwithstanding it may not have been entered on the minutes of the court.

NOTE.

The first case was decided by the Court of Civil Appeals for the First District, and the second case by the Court of Civil Appeals for the Second District, neither of which was ever passed upon by the Supreme Court. Yet the second case appears to be sustained by the Court of Civil Appeals of the Second District in the case of Walstein v. Nicholson, 105 S. W. 207. The Statute (art. 1383), under which the conflict arose authorizes an appeal or writ of error "from

an interlocutory order of the District Court appointing a receiver or trustee in any cause, provided said appeal be taken within twenty days from the entry of said order."

The two cases appear to be in conflict upon another point; the first holding that an appeal lies from an order overruling a motion to vacate the appointment of a receiver, while the second case holds that an appeal will not lie from such an order but only from an order appointing a receiver, and in so holding the second case is sustained by the *Texas O. L. Co. v. Applegate*, 114 S. W. 1160; *Fidelity F. Co. v. Hirshfield*, 91 S. W. 246 (41 C. A. 517); *Haywood v. Scarborough*, 92 S. W. 816 (41 C. A. 443); *Waters-Pierce Oil Co. v. State*, 106 S. W. 329 (48 C. A. 162).

Sec. 160. *New England L. & T. Co. v. Willis*, 47 S. W. 389 (19 C. A. 128).

Where a vendor holding for part payment notes reciting their consideration and expressly retaining a lien for their payment transferred one of the notes and all his interest in the land, the transferee takes the legal title to the land, and upon non-payment can recover the land from the purchaser.

CONTRA: *Douglass v. Blount*, 95 T. 369 (67 S. W. 484, 58 L. R. A. 699).

Where a vendor sells land and takes several notes retaining vendor's lien, then assigns one of the notes with the legal title, and the vendor afterwards forecloses on the notes held by him without making the assignee of the transferred note a party, the assignee has the right to foreclose upon the note held by him but has no right to rescind the sale and recover the land.

NOTE.

The first case is by the Court of Civil Appeals for the Fifth District, writ of error was denied by the Supreme Court, while the second case is by the Supreme Court. Judge Brown delivered the majority opinion, holding; that as the notes are in different hands and a foreclosure being had as to two of them, there is no remedy on the other note but foreclosure. Judge Williams, however, dissents and contends that as the assignee of the note was not made a party to the foreclosure suit, his right of rescission was not lost

and he had the right to pay the other notes, rescind the sale and recover from the purchaser the land bought by him at foreclosure sale.

Thus it follows that the conflict between the two cases must be considered as unsettled until the matter has been determined by the Supreme Court in an unanimous opinion by that tribunal. The following propositions, however, have been abundantly established by the authorities and a consideration of which may enable the reader to solve the conflict.

A vendor cannot dispose of the legal title so as to impair the lien of the note he had transferred. *Loan Co. v. Beckley*, 93 T. 272; *Russell v. Kirkbride*, 62 T. 457; *Atteberry v. Burnett*, 114 S. W. 159.

When the vendor assigns one of several vendor lien notes, the assignee acquires priority of lien as against those remaining in the hands of the vendor. *Perry v. Dowdell*, 84 S. W. 833 (38 C. A. 96), and others. For conflict see Sec. 175.

The foreclosure on one or more of the notes does not affect the rights of the assignee of the other note, where he is not made party. *Thompson v. Robertson*, 93 T. 170; *Foster v. Powers*, 64 T. 250.

The foreclosure on part of the notes affirms the contract as to the whole and the right of rescission is lost as to the balance. *Gardener v. Griffith*, 93 T. 355; *Whitehead v. Fisher*, 64 T. 639.

In the absence of an agreement to the contrary there is no priority between the assignees of several notes. *Delesspine v. Campbell*, 52 T. 4; *Wooters v. Hollinsworth*, 58 T. 371; *McMichael v. Jarvis*, 78 T. 671.

Priority of assignment does not affect priority of lien. *Columbia, etc., v. Roberts*, 41 S. W. 111; *Robertson v. Guering*, 50 T. 317.

The case of *Douglas v. Blount* as decided by the Court of Civil Appeals before it reached the Supreme Court and before the second volume of this work was published, questioned several cases, see Vol. 11, Sec. 411, 527 and 541, but the conflict as it then existed appears now to be shifted on to other grounds. See Sec. 175, *Perry v. Dowdell*.

§ 161. *Newton v. Alexander*, 44 S. W. 416.

It is well settled that if a party settles on land, believing it to be vacant land, with the view of obtaining title from the state, he cannot hold, by virtue of ten years statute of limitation against the true owner.

OVERRULED BY: *Price v. Eardley*, 34 C. A. 60, 77 S. W. 416.

See Sec. 204, *Schleicher v. Gatlin*.

§ 162. New York Life Ins. Co. v. Smith, 41 S. W. 680 (C. A.).

"Revised Statutes 1895, Art. 3071, providing that in all cases where loss occurs, and a life or health insurance company liable therefor fails to pay the same within the time specified in the policy, after demand made, it shall be liable to the holder of such policy, in addition to the amount of such loss, for twelve per cent. of the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of same, is in violation of the Constitution of the United States, as discriminating against said companies."

CONTRA: New York Life Ins. Co. v. Orlopp, 61 S. W. 336 (25 C. A. 488).

Revised Statutes 1895, Art. 3071, making life insurance companies failing to pay a loss within the time specified in the policy after demand therefor liable to a 12 per cent. penalty and reasonable attorney's fees for the collection of such loss, is not in violation of the fourteenth amendment to the United States Constitution, when applied to a foreign insurance company, as denying such company the equal protection of the laws.

NOTE.

It will be noted that the decision in the Smith case, was by a special court, composed of Special Justices Carter and McLean and Justice Hunter, one of the regular justices, Chief Justice Tarlton and Justice Stephens of the regular court being disqualified did not sit in the cause.

The original opinion written by Justice Carter expressed doubt of the constitutionality of this provision, but decided to follow the ruling in Casualty Company v. Allibone, 40 S. W. 399, which had held the provision constitutional and in which cause the Supreme Court had refused a writ of error. Upon motion for rehearing herein, Justice Carter granted the rehearing and declared the provision unconstitutional, and by express terms attempted to overrule both the Court of Appeals and the Supreme Court in the following cases, to-wit:

Insurance Company v. Chowning, 86 Tex. 654 (26 S. W. 982).

Insurance Company v. Walden, 26 S. W. 1012 (C. A.).

Casualty Company v. Allibone, 39 S. W. 632 (15 C. A. 178).

Casualty Company v. Allibone, 40 S. W. 399 (90 Tex. 660).

This opinion was concurred in by Special Justice McLean. Justice Hunter (of the regular court), however, filed a vigorous dissenting opinion and in same maintained that the provision under discussion was constitutional and that the decisions so holding were correct and should not be overruled. It does not appear that a writ of error was applied for in this cause, but subsequently in the case of **New York Life Insurance Co. v. Orlopp**, 61 S. W. 336 (25 C. A. 284), Justice Hunter, the author of the dissenting opinion in the Smith case, writing the opinion of the Court, again affirms the constitutionality of this provision of the statutes and disapproves of the doctrine in the Smith case, citing many cases to sustain his opinion among others: **Association v. Yoakum**, 98 Federal Rep. 251, a case in the United States Circuit Court of Appeals, wherein McCormick, Circuit Judge, affirms the constitutionality of the very provision in question. The Texas Supreme Court refused a writ of error in the Orlopp case, thus again affirming the constitutionality of the provision. The Orlopp case is followed by **New York Life Ins. Co. v. English**, 67 S. W. 884 and 70 S. W. 441 (C. A.). Finally in the case of the **Fidelity Mutual Life Association v. Mettler**, 185 U. S. 307, the Supreme Court of the United States, Chief Justice Fuller writing the opinion expressly holds that the provision in question is constitutional, citing and approving the Chowning, Allibone and Orlopp cases, a dissenting opinion is filed by Justices Harlan and Brown.

Although the Supreme Court's opinion is by a divided Court, the law seems to be established that this provision of the Texas Statute is constitutional and the majority opinion in the Smith case is overruled, and the cases which the Smith case attempts to overrule are reinstated.

See Sec. 355, King's Conflicting Cases, Vol. 2, for note on same case.

§ 163. **Nichols v. Dibrell**, 61 T. 541.

The decision of a court of competent jurisdiction is conclusive not only as to the subject-matter determined, but as to every other matter which the parties might have litigated.

LIMITED: **Kerr v. Blair**, 118 S. W. 793.

It is a general rule, having its foundation in sound reason, that the former judgment or litigation relied on as having adjudicated the matter and as a bar to further proceedings

should have involved and determined the same vital issue, or that such issue or question should have been fairly within the scope of the pleadings.

NOTE.

The limited case was decided by the Supreme Court upon the following facts, so far as they can be gathered from the opinion. Dibrell bought the property in controversy at executor's sale and then brought suit against Nichols for the title and possession. A final judgment was rendered in favor of Dibrell. After the death of Nichols, his surviving wife and children brought suit against Dibrell alleging the property to be their homestead, praying for injunction. In the second suit, Dibrell plead former judgment in bar of plaintiffs' action. The trial court sustained the plea and the judgment was affirmed by the Supreme Court.

The criticising case was decided by the Court of Appeals for the first district, and the facts upon which the decision is predicated, briefly stated, were as follows: Blair sued Kerr brothers for \$2103.80 damages for breach of a threshing contract. Kerr brothers denied the breach and plead facts showing that the damage, if any, was due to causes over which they had no control. Upon trial a final judgment was rendered in favor of Blair for \$500.00. Afterwards Kerr brothers brought suit against Blair for \$306.53 balance due upon open account, contracted prior to the institution of the first suit, Blair plead the judgment in the first suit in bar of the second. It appeared from the evidence on the trial of the cause that the open account in controversy was not plead as a counter-claim in the former suit, nor made an issue therein, but it was established by several of the jurors who rendered the verdict in the former suit, that they took into consideration the open account in controversy in assessing the damages. It will be seen from the authorities, hereinafter cited and the principles therein announced, that both the criticised and criticising cases were correctly decided, for in the first case, a judgment for land precludes every character of claim thereto, regardless of whether the particular claim or title was plead or not. For it is the identity of the subject-matter of the controversy that determines the force of the plea of *res adjudicata*, and not the character of the claim out of which the controversy arises.

In the criticising case there was no identity between the subject-matter of the first and second suit, and in order for the plea to avail the subject-matter in the second suit must have been put in issue by the pleading. The criticism therefore arises not from the fact that the Nichols case was not correctly decided, but from the

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language used in the opinion, wherein it is said the judgment of a court of competent jurisdiction is conclusive, not only as to the subject determined *but as to every other matter which the parties might have litigated in the case and which they might have had decided.*

James v. James, 81 T. 380, 16 S. W. 1087; *Norton v. Wochler*, 31 C. A. 524, 72 S. W. 1025; *Land Mtg. Co. v. McDonald*, 93 T. 398, 55 S. W. 737; *Linberg v. Finks*, 7 C. A. 396, 25 S. W. 789; *Philipowski v. Spencer*, 63 T. 607; *Crebbins v. Bryce*, 24 C. A. 532, 60 S. W. 587; *Lee v. Kingsberry*, 13 T. 68; *Tadlock v. Eccles*, 20 T. 782; *Chilson v. Reeves*, 29 T. 275; *Webb v. Mallard*, 27 T. 80; *Cayce v. Powell*, 20 T. 767; *Taylor v. Harris*, 21 T. 439; *Baxter v. Dear*, 24 T. 17; *Kempner v. Comer*, 73 T. 196; *Henry v. Thomas*, 74 S. W. 599; *Walters v. Cantrell*, 66 S. W. 790, 30 C. A. 160; *Thompson v. Lester*, 75 T. 524, 14 S. W. 21; *Freeman v. McAninch*, 87 T. 132, 27 S. W. 99; *Henderson v. Terry*, 62 T. 284; *Brown v. Renfroe*, 63 T. 602; *Smythe v. Caswell*, 67 T. 577, 4 S. W. 848; *Henry v. Sanson*, 2 C. A. 154, 21 S. W. 69; *Beer v. Lindenthal*, 1 W. & W. 282; *Lucas v. Heidenhelmer*, 3 W. & W. 429; *Murphy v. Wallace*, 3 W. & W. 512; *King's Conflicting Cases*, Vol. 2, Sec. 100, 141, 194, 240, 381, 482 and 525.

§ 164. Nolan v. Tennison, 50 S. W. 1028 (21 C. A. 332).

An action by a father on a liquor dealer's bond for "five hundred dollars as liquidated damages," recoverable under Rev. St., Art. 3380, for a sale of liquor to the son, does not abate on the principal's death, though an action on the bond by the State for a penalty recoverable under the article does abate on such event.

OVERRULED: *Johnson v. Rolls*, 97 T. 453 (79 S. W. 513).

See Sec. 224, *State v. Williams*

§ 165. Norton v. Collins, 1 C. A. 272, 20 S. W. 1113.

Occupancy of another's land with intent to pre-empt, in the belief that it is unclaimed land belonging to the State, does not constitute adverse possession.

OVERRULED: *Price v. Eardley*, 34 C. A. 60, 77 S. W. 416.

See Sec. 204, *Schleicher v. Gatlin*.

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§166. Ochoa v. Garza, 1 W. & W., Sec. 939.

In a forcible entry and detainer suit where the description of the premises in the complaint is insufficient, the error is fundamental and cannot be cured by amendment.

CONTRA: *McRae v. White*, 42 S. W. 794 (— C. A. —).

There is nothing in the statutes prohibiting amendments in cases of forcible entry and detainer, and it is prescribed by the statutes (Rev. Stat. 1895, Art. 1677) that proceedings in the justice courts shall be governed by the same rules as the county and district courts, unless otherwise prescribed. Therefore the description in a complaint for forcible entry and detainer may be amended as any other pleading.

NOTE.

The Court of Civil Appeals for the Fourth Supreme Judicial District, Judge Nelll writing the opinion in the *McRae* case, does not in so many words say that the *Ochoa* case is overruled, but the obvious effect is that such is the case.

In *Evetts v. John*, 76 S. W. 778 (C. A.), a case from the same court, Chief Justice James, cites the *McRae* case with approval and adheres to the doctrine announced therein.

The last case upon the subject is *Grandberry v. Story*, 127 S. W. 1125 (C. A.). The Court of Civil Appeals for the Sixth Supreme Judicial District, Chief Justice Wilson writing the opinion cites the *Evetts* case with approval, but does not refer to the *McRae* case.

§ 167. Ogden v. Giddings, 15 T. 486.

Where the wife refused to join in the sale of the homestead, whereupon the husband agreed that she should have one of the notes for the purchase money if she would join in the sale, and one of the notes was made payable to the wife and delivered to her, and the husband afterwards acquired another homestead, and occupied it for more than a year, although the wife did not; the purchaser, the promisor in the note, being garnished at the suit of a creditor of the husband on a

community debt, and all the parties being before the court, it was held that the proceeds of the note made as aforesaid to the wife were liable to the claim of the creditor. It seems that, if a new homestead had not been acquired, the decision might have been otherwise.

CONTRA: *Blum v. Light*, 81 T. 414 (16 S. W. 1090).

Although upon the sale or exchange of the homestead the property thereby acquired becomes liable to execution, still if the wife's conveyance of the homestead be obtained upon the conveyance of property given for it to her separate estate, the property so conveyed is upon a valuable consideration and becomes her separate property, and is not subject to her husband's debts or the debts of the community.

NOTE.

The first case is by the Supreme Court and the second is by the Commission of Appeals, and adopted by the Supreme Court in which Judge Gaines dissents, altho the reason for his dissent is not stated.

It is possible that the two cases may be distinguishable upon the ground that in the first case a new homestead had been acquired and had not been acquired in the second case. However, in the case of *Drake v. Davidson*, 66 S. W. 890 (28 C. A. 184), by the Court of Appeals for the First District, it is held there is a conflict, and the *Blum* case is followed.

Judge Garrett who rendered the opinion in the *Blum* case evidently did not realize that he was holding counter to the *Ogden* case although he refers to it.

The homestead being exempt, likewise the proceeds derived from a voluntary sale is exempt by express provision of the Statute of 1897, which was passed after the *Blum* case was decided. Prior to this Act, proceeds were not exempt: *Whittenburg v. Lloyd*, 49 T. 633; *Mann v. Kelsey*, 71 T. 609 (12 S. W. 43); *Moursund v. Priess*, 84 T. 554 (19 S. W. 775); *Kirby v. Giddings*, 75 T. 679 (13 S. W. 27).

The husband in the absence of fraud, can make the homestead or its proceeds the separate property of the wife, and it is not essential that the conveyance to her designates it as her separate estate, for the intention to make it such governs, and this may be shown by his declarations: *German Ins. Co. v. Hunter*, 32 S. W.

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344 (11 C. A. 250); *Smith v. Strahan*, 25 T. 103; *Richardson v. Hutchins*, 68 T. 81 (3 S. W. 276); or by his acts or conduct. *Peters v. Clements*, 46 T. 114. The principles announced in the foregoing cases being sound, then it must follow as a logical consequence, that whenever money or property received in exchange for the homestead, once vests in the wife as her separate estate, the acquiring of a new homestead can not affect her rights in the property thus acquired. Hence the *Blum* case appears to be supported by the greater weight of authority and is directly sustained by *Gatewood v. Scurlock*, 16 S. W. 1090; *State Bank v. Stephenson Mfg. Co.*, 23 S. W. 234 and *Burnham v. McMichael*, 26 S. W. 887 (6 C. A. 496).

§ 168. *O'Keefe v. McPherson*, 61 S. W. 534 (25 C. A. 313).

The fact that an applicant to purchase public school land is a minor will not prevent his purchasing.

CONTRA: *Walker v. Rogan*, 93 T. 248 (54 S. W. 1018).

See Sec. 261, *Watson v. White*.

§ 169. *O'Neill v. Brown*, 61 T. 39.

Where a judgment is rendered on service by publication and new trial is granted under Art. 1375, Revised Statutes, the parties are not sent back to try the old case as it stood upon the docket, but upon the allegations of the new petition and answer. Thus the defendant in the old case becomes the plaintiff in the new and he must at least *prima facie* show that the old judgment was wrong.

OVERRULED as DICTUM: *Wolf v. Sahm*, 120 S. W. 1116, 121 S. W. 561.

A proceeding under Art. 1375, Revised Statutes, authorizing a new trial for good cause shown, upon defendant's application, where judgment was rendered against him on service by publication without appearance, is not an original suit but a continuation of the former suit, and the order vacating the original judgment is an interlocutory order from which no appeal lies.

NOTE.

The overruled case was decided by the commissioners of appeals and the overruling case by the Court of Civil Appeals for the Third District. The overruled case has been followed by the case of *Brown v. Brown*, 61 T. 45, by the Commissioners of Appeals, and the case of *Brown v. Dutton*, 85 S. W. 455 (38 C. A. 294), decided by the Court of Civil Appeals. The opinion in the overruling case rendered by Associate Justice Key of the Third District, and the opinion in the case of *Brown v. Dutton* was rendered by Associate Justice Eldson also of the Third District; who uses the following language:

"We conclude that it is clear from the above authorities that a proceeding under article 1375, Rev. Stat. 1895, supra, to set aside a judgment rendered on service of citation by publication in the district or county court, should be tried on the pleadings of the parties in such proceeding, separate from the original case, and that either party may appeal from the judgment in such action or proceeding, and that the method of appeal or practice on such appeal will be controlled by the judgment rendered in such action or proceeding, without reference to the judgment in the original case."

From the above it is impossible to reconcile the conflict between the two opinions rendered by the same court.

The following authorities appear to support the overruling case: *Miles v. Dana*, 13 C. A. 240, 36 S. W. 848; *Glaze v. Johnson*, 27 C. A. 116, 65 S. W. 662; *Goss v. McClaran*, 8 T. 341; *State v. Dashiell*, 32 C. A. —, 74 S. W. 781; *Rose v. Darby*, 76 S. W. 800 (33 C. A. 341); *Bean v. Dove*, 77 S. W. 244 (33 C. A. 377); *Tinsley v. Corbett*, 66 S. W. 913 (27 C. A. 633); *McLane v. S. A. National Bank*, 68 S. W. 65; *Keator v. Case*, 31 S. W. 1099; *Mussina v. Moore*, 13 T. 7; *Kitchem v. Crawford*, 13 T. 519; *Stewart v. Jones*, 9 T. 469; *Snow v. Hawpe*, 22 T. 1668.

The overruling case followed the case of *Glaze v. Johnson* above cited, decided by the Court of Civil Appeals of the First District and a writ of error denied by the Supreme Court.

The great weight of authorities as indicated by the cases above cited establish the following propositions, 1st. When judgment is rendered upon personal service a new trial can never be granted after the expiration of the term. 2nd. Where judgment is rendered on service by publication a new trial may be granted, under Art. 1375, Rev. St., for good cause shown at any time before the expiration of two years. 3rd. A motion for a new trial under Art. 1375, Rev. St., is not a new suit but a continuation of the old one, and the order granting the motion and vacating the

former judgment, is not final but interlocutory, from which an appeal will not lie. 4th. A judgment rendered either on personal service or on service by publication may be vacated and set aside by an original suit in equity brought within four years from the date of its rendition. For authorities on effect of new trial granted after expiration of the term see King's Conflicting Cases, Vol. 1, Sec. 92, 94, 110, 199, 217.

§ 170. Osborne v. Robinson, 35 S. W. 327 (C. A.).

The survivor of the community administers the estate free of control, and independent of the jurisdiction of the county court sitting in probate, and if she comes into possession of the community property as survivor, she may be sued, with the same remedies existing in favor of the creditor of the community estate as would exist in a case in which a surviving husband was sued when administering the community estate.

CONTRA: Whitmore v. Farmers' Nat. Bank, 97 S. W. 512 (— C. A. —).

A suit to enforce the payment of a community debt could be properly brought directly against the surviving widow of the deceased husband only in the event no child or children survived and the deceased left no separate estate.

NOTE.

The first case is by the Court of Civil Appeals for the Third District and the second case is by the Court of Civil Appeals for the Fifth District, neither of which appears to have ever been reviewed by the Supreme Court.

The statute, article 2220, the construction of which involves the conflict is as follows:

"Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community, and no administration thereon or guardianship of the estate of the insane wife or husband shall be necessary."

The Whitmore case is sustained by the Supreme Court in the case of Vela v. Guerra, 75 T. 595 (12 S. W. 1127), wherein it is held: The husband dying intestate, the widow not qualifying as

survivor of the community, the creditor could compel administration. His suit against the widow, without showing that there were no surviving children of the marriage, or that she had qualified, could not be maintained if resisted. The mere possession by the widow did not authorize suit against her by a creditor of the community as executrix *de son tort* under our law.

The court of Civil Appeals in the Osborne case cites in its support a number of decisions by the Supreme Court, upon examination of those cases it will be found that they are all plainly distinguishable. *Hollingsworth v. Davis*, 62 T. 441, was where the wife was the sole legatee under her husband's will. *Evans v. Taylor*, 60 T. 422, was where the wife qualified as community survivor. *Woodley v. Adams*, 55 T. 526, was where the wife was independent executrix of her husband's will. *Carter v. Conner*, 60 T. 52, was where the surviving husband was being sued. *Huppmann v. Schmidt*, 65 T. 583, was a suit against the husband who was the qualified survivor. *Frank v. De Lopez*, 21 S. W. 279 (2 C. A. 245), was where the wife was sued as the qualified community survivor. The case of *Wiseman v. Swine*, 114 S. W. 145, by the Court of Civil Appeals for the Fourth District, which was a suit against the qualified community survivor for a community debt, yet the language used, altho dicta, seems to support the Osborne case for the court says:

"The survivor of a community estate may be sued, in courts having jurisdiction of the subject-matter, before or after taking out letters of survivorship."

The Whitmore case not only appears to be supported by the authorities but by the better reason, for if the husband dies leaving children, community property and community debts, and no separate estate, it would be unjust to make the wife liable at the suit of the community creditors, when she only owns half of the property, and more especially so as the creditors can open administration and collect their debts through the Probate Court. On the other hand if there be no children she takes under the statute all of the community property charged with the community debts, and where there is no separate estate it is only equitable that she be compelled to pay the debts. No doubt these considerations moved the legislature in the enactment of article 2220.

A solution of the conflict leaves the rule thus; a creditor of the husband can not sue the surviving wife simply on the allegations that he left no separate estate and she had taken possession of the community property, but he must also allege that there is no necessity for administration, and when she is sought to be made liable under art. 2220, the creditor must allege and prove that he left no separate estate or child or children surviving.

§ 171. *Ott v. Johnson*, 101 S. W. 534 (— C. A. —).

Article 3017 of Revised Statutes, providing that an action for injuries causing death may be brought when death is caused by negligence of the proprietor, owner, charterer, hirer of any railroad, steamboat, stagecoach or other vehicle for the conveyance of goods or passengers, does not apply to tram railroads owned and operated by private individuals on their own premises for private purposes.

CONTRA: *Cunningham v. Neal*, 101 Tex. 338 (107 S. W. 539, 15 L. R. A. [N. S.] 479).

A private corporation operating sugar mills, refineries, etc., owning tracks upon the premises connecting with public railway lines and upon which, by a hired locomotive, cars are transferred to and from such railways and moved as its business required was "operating a railroad" in so doing; within the meaning of the statute and liable for injury to one of its servants by the negligence of a fellow servant in such operation of cars.

NOTE.

The statute, Art. 3017, the construction of which occasions the conflict is as follows:

"An action for actual damages on account of injuries causing the death of any person may be brought when the death is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage coach, or other vehicle for conveyance of goods or passengers, or by the unfitness, negligence or carelessness, of their servants or agents; when the death of any person is caused by the negligence, or carelessness of the receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents, and the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages on account of injuries, the same as if said railroad were being operated by the railroad company."

The *Ott* case was decided by the Court of Appeals for the first district and was never passed upon by the Supreme Court. The

Cunningham case was decided by the Supreme Court and holds directly contrary to the Ott case, but does not mention it. In *Rice v. Lewis*, 125 S. W. 961, decided by the Court of Appeals for the first district that Court follows the Cunningham case and notes the conflict between that and the Ott case. In *Kirby Lumber Co. v. Owens*, 120 S. W. 936, decided by the Court of Civil Appeals for the fourth district, it is held that a tram road operated as appurtenant to a sawmill, was a "railroad" within the meaning of the statute. The same case was reviewed by the Supreme Court on writ of error (124 S. W. 903), and the finding of the Court of Appeals sustained. Chief Justice Gaines delivering the opinion cites with approval the Cunningham case. The case of *Lodwick Lumber Co. v. Mounce*, 89 S. W. 358, 102 S. W. 142, by the Court of Civil Appeals of the Fifth District is very similar in facts to the Kirby case. The Court finds that the injured servant has a right of recovery, although the question in conflict is not raised, at the same time it cites with approval the same case tried on two former appeals 87 S. W. 358 and 91 S. W. 240, where the question in conflict is raised and expressly decided in accord with the Cunningham case. *Keystone Mills Co. v. Chambers*, 118 S. W. 178, by the Court of Appeals for the fourth district holds that a "railroad," included a logging railroad operated by a corporation solely to carry its own timber from the woods to its sawmill, and cites the Cunningham case. *Fleming v. Texas Loan Agency*, 87 Tex. 239, 27 S. W. 126, holds that the statute in question confers a right of action against a private corporation, other than a common carrier, for the death of any person caused by the negligence of such private corporation. This case practically overrules the case of *Ritz v. Austin*, 20 S. W. 1029.

See Sec. 85, *Halbert v. T. C. & L. P. Co.*

§ 172. *Oxford v. Frank*, 70 S. W. 426 (30 C. A. 343).

In a contested election, not for officers, the contest is not confined to the grounds enumerated in the statute, but may be contested upon any ground that would render the election illegal.

CONTRA: *Norman v. Thompson*, 96 T. 250 (72 S. W. 62).

See Sec. 181, *Rayner v. Forbes*.

§ 173. Parks v. O'Connor, 70 T. 377 (8 S. W. 104).

A contract for the sale and delivery of 8000 head of yearlings "all to be good merchantable cattle" does not imply a special warranty, upon which the vendee cannot recover when the cattle are infected with a latent disease.

CONTRA: Ellis v. Riddick, 78 S. W. 719 (34 C. A. 256).

A contract for the sale and delivery of a crop of cane, "said cane to be sound, ripe and merchantable" implies a special warranty upon which the vendee may recover, when the cane delivered is not of the character described.

NOTE.

The first case is by the Supreme Court, while the second is by the Court of Civil Appeals for the Third District. The question in conflict was material and necessary to the decision in each case. The vendee in both cases received the property with knowledge of the defective condition, which would have prevented a recovery in the absence of a warranty. On the other hand, a vendee who buys with a warranty may accept the property knowing it to be not such as warranted and still recover damages for the breach. The court in the Parks case cites *Jones v. George*, 61 T. 345 (48 Am. Rep. 280), in its support. In that case, however, no warranty existed, though there was an implied contract that the seller sold and delivered an article of the kind contracted.

The Court of Appeals in the Ellis case seems to recognize the fact that the opinion is in conflict with that of the Supreme Court in the Parks case, and cites in its justification the case of *Blythe v. Speake*, 23 T. 429, by the Supreme Court, wherein it was held;

"A bill of sale, in the ordinary form of a deed for land, granting and conveying to the vendee, his heirs and assigns, forever, 'a negro man, slave for life, by the name of Sam, about twenty-eight or thirty years old, sane and healthy (except one finger stiff), in mind and body,' constituted, on its face, a warranty of soundness; although it concluded by a warranty, in terms, not extending beyond a general warranty of title."

This decision appears to support the principle announced by the Court of Civil Appeals in the Ellis case.

The following incidentally discuss the question in conflict and the remedies of the vendee for the breach of an express warranty:

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Brantley v. Thomas, 22 T. 270 (73 Am. Dec. 264); *Blythe v. Speake*, 23 T. 429; *Aultman v. Hefner*, 67 T. 54, 2 S. W. 861; *Boehringer v. Richards Medicine Co.*, 29 S. W. 508, 9 C. A. 284; *Danner v. Ft. Worth Implement Co.*, 45 S. W. 856, 18 C. A. 621; *Houchins v. Williams*, 25 S. W. 53; *Helsig Rice Co. v. Fairbanks*, 100 S. W. 959, 45 C. A. 383.

§ 174. *Peck v. Jones*, 30 S. W. 382 (10 C. A. 335).

If a person by permitting the legal title to land to stand in the name of another, induced persons to extend credit to such other (trustee) on the faith of his apparent ownership, it may be that the true owner of the land would be estopped, in proper proceedings instituted by such creditors, from denying their right to proceed against the land.

OVERRULED as DICTA: *Bicocchi v. Casey-Swasey Co.*, 91 T. 259 (42 S. W. 963, 66 A. S. R. 875).

Where a person has transferred land to another upon a secret trust to reconvey such property to him when demanded, and upon the faith of such land standing in the name of such trustee, even when such trustee has directly represented such land to be his, the true owner of the land is not estopped from claiming same, unless the creditors have acquired a lien or fixed right to the property before same is reconveyed to the true owner by such trustee, and expressions to the contrary in *Peck v. Jones*, supra, to the contrary are dicta.

NOTE.

In the *Bicocchi* case the Supreme Court very carefully analyses the authorities upon the subject and disapproves of *Peck v. Jones*.

§ 175. *Perry v. Dowdell*, 84 S. W. 833 (38 C. A. 96).

Where one or more of a series of notes secured by a lien is assigned by the owner, the assigned note is entitled to priority in the lien over the other notes of the series.

DOUBTED: *Fitch v. Kennard*, 133 S. W. 738.

Where a vendor sold land, taking as part consideration four notes secured by a vendor's lien, and for a valuable consideration assigned without recourse the note first maturing, the assignee of that note was not, in case of foreclosure, entitled to priority, in distribution of the proceeds over the notes retained by the vendor, as he expressly repudiated all responsibility for payment of the note transferred.

NOTE.

The doubted case is by the Court of Civil Appeals for the Fourth District, but does not appear to have ever been reviewed by the Supreme Court. The doubting case is by the Court of Civil Appeals for the Sixth District, in which a writ of error was denied by the Supreme Court.

In both cases there is a contest for priority between the vendor who has retained some of the notes, and an assignee to whom the vendor has assigned one of the notes. In the doubted case the transfer was made by endorsement, while in the doubting case the endorsement is made without recourse, and on this ground the two cases are plainly distinguishable and but for the doubting language used by Chief Justice Wilson in the Fitch case, when speaking of the Perry case, the conflict would not be noticed. When the second volume of this work was published, Section 411, it was thought that the great weight of authority sustained *Fisher v. Whitehead*, 64 T. 638; *White v. Downs*, 40 T. 233, *New England L. & T. Co. v. Willis*, 47 S. W. 389 (19 C. A. 128); *Douglas v. Blount*, 55 S. W. 527 (22 C. A. 493); *Dilley v. Freedman*, 60 S. W. 449 (25 C. A. 39), holding that where a vendor assigned one of several notes held by him, the assignee by virtue of the assignment acquires priority of lien as against the remaining notes held by the vendor, notwithstanding it was intimated by the Supreme Court in *Douglas v. Blount*, 93 T. 499 (56 S. W. 334), that the right of priority was not given by the mere assignment but depended upon an express or implied agreement that the assignee should have priority. In the case of *Anderson v. Perry*, 98 T. 493 (85 S. W. 1138), the Supreme Court refuses to confirm its previous intimation but says:

"It is not necessary for us to decide, in this case, the question whether, when the holder of two or more promissory notes, which are executed at the same time and are secured by a lien upon real estate, assigns one of them and retains the other or others, he thereby gives to the assignee a priority of lien to secure the note so assigned. We do not pass upon that question."

The Court of Civil Appeals for the Fourth District in the doubted case (*Perry v. Dowdell*), declined to follow *Salmon v. Downs*, 55 T. 246; *Wooters v. Hollingsworth*, 58 T. 371; and the Supreme Court's intimation in the *Anderson* case, and adhered to its holding in the *Fisher* and other cases above cited.

The Court of Civil Appeals for the Sixth District in *Walcott v. Carpenter*, 132 S. W. 981, follows the Fourth Court of Civil Appeals in the *Perry* case holding that an endorsement in blank of one note gives priority of lien as against the remaining notes held by the vendor. The same court in the doubting case (*Fitch v. Kennard*), while doubting the correctness of the decisions by the Fourth Court of Civil Appeals, raises a new issue in the conflict, holding that where a vendor endorses without recourse, one of several vendor lien notes, the assignee is not entitled to priority. In which the Supreme Court denied a writ of error. If this rule be correct, then it follows that it is not the actual transfer or assignment of the note which creates the priority but the endorsement, and as the endorsement creates the priority, the endorsement without recourse destroys it.

In *Pomeroy's Equity Jurisprudence*, Sec. 1203, it is said:

"When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien, as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature."

This statement by Mr. Pomeroy seems to place the right of priority on the equitable ground that the vendor having sold the note for value to a bona fide purchaser who bought upon faith that the note was amply secured, ought not to be permitted to share equally in the security if it proved insufficient to pay all the notes, rather than upon the ground that the right of priority is created by endorsement and when the security proves insufficient he is estopped by his endorsement to deny priority.

For conflict on kindred question see Sec. 160, *New England v. Willis*.

§ 176. *Petty v. Miller*, 24 S. W. 330 (5 C. A. 308).

Where an appeal from justice of the peace has been perfected by service of the notice of appeal, and the execution and filing in the district court of a proper appeal bond, the failure of the justice to make out and transmit to the district court a trans-

script of his records, is no ground for dismissing the appeal, for the party appealing should not be held responsible for the refusal of the justice to comply with the law.

CRITICISED BY: *Missouri, K. & T. Ry. Co. v. Bland*, 119 S. W. 911.

Defendant appealed from a judgment of a justice and when the case was called for trial it was discovered that the transcript was not certified by the justice. The defendant thereupon applied for a certiorari to have the transcript authenticated. The case was then continued in order to have the justice authenticate it, and the defendant withdrew his application for certiorari. At a succeeding term the plaintiff moved to dismiss the cause for want of a transcript and defendant again applied for a certiorari, which application was overruled and the case dismissed. Held, that the burden rests upon the appellant to cause the transcript to be filed, and he must not only perform that duty but is required to exercise proper diligence in order to prevent unnecessary delay, and it was proper to overrule the application and dismiss the appeal.

NOTE.

Judge Key of the Third District in the criticising case uses the following language:

"We have examined the cases of *Petty v. Miller*, 5 Tex. Civ. App. 308, 24 S. W. 330, and *Campbell v. Bechsenchutz* (Tex. Civ. App.), 25 S. W. 971, decided by the Fourth Court of Civil Appeals. The cases are not entirely analogous, although they contain the expression tending to support appellant's contention in this case; but, however that may be, and while we entertain great respect for that learned court, its decisions are not binding upon us, and the two cases referred to will not be followed to the extent insisted on in this case."

The opinion in the case of *Campbell v. Bechsenchutz* was delivered by Judge Fly for the Fourth District and he evidently followed his own opinion previously rendered in the case of *Petty v. Miller*.

The criticising case appears to rely for support upon *Coats v. Bryan* (C. A.), 40 S. W. 748; *Ross v. McGowen*, 58 T. 608; *St. L. & S. F. Ry. Co. v. Pettigrew* (C. A.), 97 S. W. 338; none of which

however appear to fully sustain the contention. The Coats case holds that when the justice fails to certify to the transcript, the appellant on discovering the defect should be allowed a reasonable time to have the same corrected and the court should extend its aid for so doing. The Ross case arose from a defective transcript prepared by the district clerk under a different statute, and the court in that case says:

"The Supreme Court will not, after the submission of a cause and after its decision, grant a rehearing and issue a certiorari to perfect the record when the motion for rehearing is based on the defectiveness of the record, and when no excuse is offered to show why the defect was not discovered before the submission."

In the St. Louis case the appellant after the cause had been submitted in the court of appeals and an opinion rendered, asked for a rehearing and for a writ of certiorari to have brought up as a part of the record from the justice court the appeal bond and transcript. The court holding that the appellant failing to show that such omission was not due to want of care on his part, the motion came too late.

In the case of Brown v. Grinnan, 2 W. & W., Sec. 413, it is held:

"When an appeal is taken from the justice court it is the duty of the justice to make a true and correct transcript of all entries made on his docket, and transmit the same with the original papers in the case to the clerk of the county court."

In the case of Jones v. Spann, 3 W. & W., Sec. 248; Foos Mfg. Co. v. Prather, 4 W. & W., Sec. 131; Gulf C. & S. F. Ry. Co. v. Connerty, 4 W. & W., Sec. 207, it is held:

"A motion to dismiss an appeal from a justice court will not be sustained upon the ground of failure to file the transcript in time, unless the transcript has not been filed on the first day of the next term of the county court after the return term of the appeal."

In the case of Edwards v. Morton, 92 Tex. 152, 46 S. W. 792, the Supreme Court holds:

"Article 1673 requires the justice to perform this duty whenever an appeal has been granted, but neither the justice of the peace nor any other officer has power to grant or refuse an appeal, and we understand the language to mean, that when the parties have so complied with the law, as that they are entitled to prosecute the appeal, the certified transcript and original papers must be forwarded. An appeal is perfected under article 1672, Revised Statutes, if bond or affidavit be filed, when the parties have placed themselves by compliance

with the law in position to demand of a justice of the peace the transmission of the original papers and a transcript from his record to the county court."

The following cases more or less discuss the question at issue in the conflicting cases: *King v. Lacey*, 4 W. & W. 444, 17 S. W. 143; *Trial v. Lepori*, 1 W. & W. 738; *Hensen v. Martin*, 2 W. & W. 204; *Texas, etc., Ry. v. Dyer*, 2 W. & W. 270; *Jones v. Spann*, 3 W. & W. 347; *Raley v. Jones* (C. A.), 25 S. W. 144.

It is very evident from the authorities herein before cited, that a correct conclusion was reached in both the criticised and criticising cases, as the facts upon which they are predicated are plainly distinguishable and the conflict arises from the language used rather than the result reached in the two opinions.

From the great weight of authorities the following rules should govern the dismissal of appeals for failure to file the transcript:

First. The appeal can not be dismissed at the first term for it is left discretionary with the justice to say whether it is "practicable" for him to file same at that time.

Second. The appeal can be dismissed at the second or any subsequent term, if appellant has failed to make a demand upon the justice for the transcript.

Third. The appeal can not be dismissed at the second term, if the justice upon demand has refused to make and forward the transcript, but appellant will be given time to procure same by mandamus.

See *King's Conflicting Cases*, Vol. 2, Sec. 39 and Sec. 378, wherein it is shown that *Petty v. Miller* is in conflict with *Broadway v. Clepper*, 1 W. & W., Sec. 306, and *Davis v. American Freehold L. M. Co.*, 12 C. A. 37, 33 S. W. 271, is also in conflict with *Petty v. Miller*.

§ 177. *Pioneer Saving & L. Co. v. Everheart*, 44 S. W. 885 (18 C. A. 192).

A lien upon a homestead to secure money advanced to enable the owner of the homestead to pay for labor and material used in the erection of a dwelling house thereon is within the exception of the Constitution, Art. 16, Sec. 50, providing that no lien on the homestead shall be valid, except for the price therefor or improvements thereon, and hence such lien is valid, and it is not necessary to the validity of such a lien, that the money so furnished should have been directly expended in the improvement.

CONTRA: Giradeau v. Perkins, 126 S. W. 635 (— C. A.—).

Under the provisions of the Constitution, Sec. 50, Art. 16, a valid lien cannot be created upon a homestead to secure money borrowed on the property, even when it is made to appear that it was actually used for that purposes, if there was no contract for furnishing the materials or doing the work.

NOTE.

It will be noticed that in fact there was a contract in the Everheart case, but in the reasoning by which the Court reached its conclusion it treated the case as if the question involved was, can a third party advance the money to pay for such labor and material to improve a homestead, and have a lien directly in his favor to secure such advancement without there being any contract to build or furnish material or labor? The Court, Chief Justice Finley writing the opinion reached the conclusion that a third party could so advance the money to pay for labor and material, and that the lien under the constitution would be good. In reaching the opinion, the Court argued that the owner could contract liens in favor of materialmen and laborers and that they could assign such liens to the third party and that this would unquestionably be legal, and this would be simply doing indirectly what would be accomplished by the direct loan in the first instance and that no reason exists why the distinction should be observed.

The case of Loan Company v. Paschal, 34 S. W. 1001 (12 C. A. 613), is cited as authority for the holding. It will be observed, however, that there also was a building contract in that case. The Paschal case was again before the Court of Appeals in 47 S. W. 100, and cites the Everheart case as authority for holding the contract valid. A writ of error was refused by the Supreme Court.

In Downard v. National L. & I. Co., 55 S. W. 981 (writ of error refused by the Supreme Court), the facts were about as follows: Hulen, agent for the Loan Company, contracted with all the forms of the law with Downard and wife to *build him a home*, he then assigned the note to the Building and Loan Company and the company advanced the money to Hulen and he gave it in *bulk* to Downard, who employed labor and bought materials and paid for them *with the money so advanced to him*. Hulen did not build the house and it was understood by all the parties that he was not to build it, although he intended to see that it was built. The Court, Justice Connors writing the opinion, held that the lien was good

and cited without comment among other cases the Everheart case. Again Chief Justice Connors in *Bayless v. Standard Saving & Loan Association* referring to the Downard case, used the following language: "that a contract or lien in whatsoever form it may appear, which excluded the idea of a mere loan, and is executed in accordance with the formalities required by the Constitution, with the real purpose and effect of thereby securing the necessary labor and material used in constructing improvements upon the homestead lots should be upheld," and again cites among others the Everheart case. Among the other cases cited by Justice Connors in the Bayless case is that of the *First National Bank of Muskogee v. Campbell*, 46 S. W. 845. The facts in that case were as follows: That under a building contract regular in form and execution, the contractor did not build the house, but advanced the money to the husband who actually expended it for labor and materials used in erecting the home, the Court, Justice Neill, writing the opinion, held that this was such performance as would entitle the contractor to his lien. It will be noted that in all of the cases above cited there was an actual *building* contract, and the decisions turned upon the question as to whether or not the building was actually done and whether it made any difference if the contractor did the work or merely handed over the money to the owner. And the effect of all these decisions is believed to be, that where there is an actual building contract, executed according to the Constitution and Statute, *and the work is actually done*, that it makes no difference whether the contractor did the work or merely gives the money to the owner who pays it out. In either event the lien is good. It is true that the reasoning in the Everheart case goes further than this, but it is believed that where it does so, it was not necessary in the decision of the case and is therefore dicta, and that when the case is cited it does not mean that the dicta is approved.

The facts in the Girardeau case were about as follows: The party advancing the money took a deed of trust to secure same, which deed of trust was regularly and properly acknowledged by both husband and wife. This deed of trust included several items, a vendor's lien, taxes on the property and \$127.00 to be used for improvements. The \$127 was actually so used for improvements, but there *was no contract to do the work or to furnish the material*. The Court of Civil Appeals, First Judicial District, Justice Reese, writing the opinion, held that this was not sufficient under the Constitution to give a valid lien in the *absence of a contract to do the work or furnish* the material.

The Supreme Court as it did in the Downard case above cited, refused a writ of error.

Justice Reese cites *Gaylord v. Loughridge*, 50 T. 573; *Campbell v. McCampbell*, 34 S. W. 970; *Loan Association v. Logan*, 33 S. W. 1089; *Ellerman v. Wurz*, 14 S. W. 333, as sustaining his opinion.

An examination of these authorities seem to bear out Justice Reese in his strict and technical construction of the Constitution provision.

§ 178. *Polk v. Herndon*, 93 S. W. 531 (42 C. A. 441).

Under Revised Statutes 1895, Art. 1375, allowing a defendant served by publication two years in which to have the judgment set aside for good cause shown, the court may refuse to set aside the judgment where limitation is the only defense to the demand on which the judgment was obtained.

OVERRULED: *Fred v. Fred*, 126 S. W. 900 (— C. A. —).

Under Revised Statutes 1895, Art. 1375, allowing a judgment obtained under service by publication to be set aside on good cause shown, and a new trial be granted within two years, defendant, cited by publication, was entitled to have default judgment therein set aside on proof that plaintiff's cause of action was barred by limitations when he commenced suit.

NOTE.

The overruled case was decided by the Court of Appeals for the third district and was never reviewed by the Supreme Court. The overruling case was decided by the same court and an application for writ of error to the Supreme Court was dismissed. The overruled case cites and is sustained by the case of *Foster v. Martin*, 20 T. 119, and *Dowell v. Winters*, 20 T. 794, and both must be considered as overruled. The case of *Cochran v. Middleton*, 13 T. 275, holds that a new trial will not be granted to let in the defense that the debt was paid by winning at cards, and is therefore in accord with the overruled case. However, the following authorities are in accord with the overruling case: *Snow v. Hawpe*, 22 T. 168; *Mussina v. Moore*, 13 T. 7; *Kitchen v. Crawford*, 13 T. 516. If a motion made in two years to set aside a judgment rendered on service of publication is to be considered as a bill of review, and purely an equitable proceeding, then there might be some doubt as to the soundness of the overruling case, but in view of the fact that our courts now hold that the motion must be considered not

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as a new suit, but as a continuation of the old one, and in view of the further fact that in this State both law and equity are administered by the same tribunal, the overruling case must be considered as sound and it appears to be supported by the weight of authority.

On the question as to whether the motion is to be considered as a continuation of the old or a new suit, see Sec. 169 (O'Neill v. Brown).

§ 179. Porter v. Martyn, 32 S. W. 731.

In a suit for a malicious prosecution where the charge to the jury recites that before plaintiff can recover a judgment against defendant, the jury must believe from the evidence that the prosecution was "without probable cause," sufficiently presents to the jury the issue "that the charge must have been false," because if without probable cause, it necessarily follows, that it could not have been true.

CONTRA: Missouri, K. & T. Ry. Co. v. Groseclose, 110 S. W. 477 (50 C. A. 525).

In a suit for malicious prosecution where the jury is charged, that in order for plaintiff to recover they must believe from the evidence "that the prosecution was without probable cause," but there is omission to charge that they must believe that "the charge was false," or that "plaintiff was not guilty of the crime charged," the charge to the jury is fatally defective, because the innocence of plaintiff is one of the requisites entitling him to recovery, and such issue is not covered by the simple charge "That they must believe that the prosecution was without probable cause."

NOTE.

See Sec. 113, Hurlburt v. Boaz.

§ 180. Qualls v. Sayles, 45 S. W. 839 (18 C. A. 400).

Under the Acts of the Legislature, Session Act 1901, p. 314, c. 136 providing that a liquor dealer shall give a bond

that he will not sell to a minor, or permit a minor to "enter or remain" in his place of business, held, that the conditions are separable and the fact that the minor only "entered" and "remained" long enough to obtain and drink a glass of soda water or other drink, was no defense to a charge of a breach of the condition in the bond against allowing him to "enter and remain" in the saloon, and this though the sale to the minor may not under the circumstance have been unlawful, by reason of the sale being in good faith, upon the well grounded belief that the minor was of age.

CONTRA: *Cox v. Thompson*, 75 S. W. 819 (32 C. A. 572).

Where the facts show that there was a mere sale, as contradistinguished from what is meant by the term "enter and remain"—and where it is further shown that the sale was in good faith and with a well grounded belief that the person to whom sale was made is of lawful age, then a suit on a bond for breach of the condition against "entering and remaining" cannot be maintained on proof of such mere sale, notwithstanding the fact that the minor entered and remain long enough to purchase and drink intoxicating liquor.

NOTE.

The *Cox* case was decided by the Court of Civil Appeals for the Third District, after the cause had been certified to the Supreme Court (see 73 S. W. 950), 96 T. 468, and the Supreme Court expressly refused to decide the exact point, claiming that same was not covered by the questions certified. Thereafter as before stated, the Court of Civil Appeals decided the question in conflict with the *Qualls* case, and no writ of error was applied for. The same question arose in *Minter v. State*, 76 S. W. 312 (33 C. A. 182), and in that case Chief Justice Conner writing the opinion analyses the law and the decisions and decides to follow the Court of Civil Appeals in the *Cox* case as opposed to the doctrine in the *Qualls* case, and the Supreme Court refused a writ of error.

In *Tinkle v. Sweeney*, 97 T. 190 (77 S. W. 609), the Supreme Court on certified question from the Fifth Court of Civil Appeals, announced the rule to be as previously announced in the *Cox* case, and in doing so, stated that the *Qualls* case was distinguishable on its facts "but whether it may be distinguished on principle we need

not here determine." And in the same case upon its return to the Court of Civil Appeals the same doctrine is announced (78 S. W. 248).

The Tinkle case is cited with approval in *Douthitt v. State*, 98 T. 344 (83 S. W. 795). In this case the facts were somewhat different, and the decision was that where a minor enters a saloon momentarily on some business, the bond is not violated.

In *Holly v. Simmons*, 99 T. 230 (89 S. W. 776), the Tinkle case is again cited but not upon the precise point, although the case should be examined as showing the tendency of the Court.

In *White v. Manning*, 102 S. W. 1161 (46 C. A. 298), the doctrine announced in the Cox and Tinkle cases was followed, but the facts in that case showed that after the minors had obtained their drinks they loitered, "remained" for ten or fifteen minutes. This the Court held was a violation of that clause in the bond.

§ 181. *Rayner v. Forbes*, 52 S. W. 568 (C. A.).

Under Constitution amended 1891, giving the district court jurisdiction of contested elections, and under Sayles Civil Statutes, Art. 812, making it the duty of a county judge to order an election to fix the county seat on application by not less than one hundred resident freeholders, the judge has no power to order such election on application of any less number, and an election held upon a petition of a less number of votes is invalid and may be contested.

CONTRA: *Norman v. Thompson*, 96 T. 250 (72 S. W. 62).

Under the Constitution and Statutes authorizing contests of elections, such proceedings are special and the courts are limited in their investigation to such subjects as are specified in the law. And under such statutes the word "election" as used, means the act of casting and receiving the ballots from the voters, counting the ballots and making returns thereof. That is the meaning of the word "election," in ordinary usage and it must be so construed. Therefore questions such as sufficient number of petitioners in a petition for election or posting of notice for a sufficient length of time are not grounds of contest.

NOTE.

The case of *Scarborough v. Eubank*, 52 S. W. 569 (C. A.), in following the *Rayner* case, goes further and in substance decides, that in a proceeding to contest (a county seat) election, brought after the result is declared, *every matter affecting the validity of the election*, including the sufficiency of the petition on which the election was ordered, may be determined.

The case of *Oxford v. Frank*, 70 S. W. 426 (30 C. A. 343), announcing the same opinion, holds directly that in a contested election the parties are not restricted to the grounds of contest enumerated in the statute.

The Supreme Court in *Stinson v. Gardner*, 97 T. 287 (78 S. W. 492), held that the fact that some one had paid some five hundred poll taxes for voters, unless it was further alleged and proved that some of these had voted against contestants (thus bringing the question within the rule of conduct on election day), there was no ground of contest.

In *Whaley v. Thomason*, 93 S. W. 212, 41 C. A. 405, the Court of Civil Appeals notes the conflict, and calls the Supreme Court's decision the "restricted view," and calls the decision in the *Rayner*, *Scarborough* and *Oxford* cases the "liberal view," this is but natural, as the same court, the Second Court of Civil Appeals, decided them.

The *Norman* case appears again decided by the Court of Civil Appeals in 72 S. W. 64 (30 C. A. 537), and of course follows the ruling of the Supreme Court.

Lowery v. Briggs, 73 S. W. 1062 (C. A.), likewise follows the *Norman* case or "restricted view."

In *Martin v. Mitchell*, 74 S. W. 565 (32 C. A. 385), the Court recognizes that the case of *Oxford v. Frank* has been practically overruled, but reverses the cause upon other grounds.

In *Ex parte Heyman*, 78 S. W. 349 (45 T. Cr. 532), a decision by the Court of Criminal Appeals, the following language is used:

"However, as stated before, no matter what may have been the holding of the Court of Civil Appeals and the Supreme Court upon these questions, in our opinion, since the decision in *Norman v. Thompson*, none of them would be authority upon any question concerning the local option election, except what transpired on the day of the election, hindering a full and fair election."

Judge Brooks in a dissenting opinion in the last mentioned case refers to the conflict but expresses no opinion on same (78 S. W. 356).

In *Robinson v. Wingate*, 80 S. W. 1067 (36 C. A. 65), the Court of Civil Appeals cites the *Norman* case with approval as does also *Hash v. Ely*, 100 S. W. 980 (45 C. A. 259); *Cofield v. Britton*, 109 S. W. 493 (50 C. A. 208); a writ of error was dismissed in this case for want of jurisdiction; and in *Kilgore v. Jackson*, 118 S. W. 819 (C. A.).

It would therefore seem that all such contests are confined to happenings during the actual conduct of the election on election day, and all cases to the contrary are overruled.

For further discussion see *Parrish v. Ralls*, 133 S. W. 933 (C. A.).

§ 182. *Read v. Allen*, 63 T. 158.

Where one holding a deed to land described by metes and bounds leases a part of it to a tenant by specific metes and bounds, then the possession of the tenant is only coextensive with the bounds specified in the lease, and not with the whole tract.

CONTRA: *Bowles v. Brice*, 66 T. 724 (2 S. W. 729).

One who leases for purposes of cultivation the improved portion of a tract of land to a tenant, and has no actual possession of that portion which is not improved, holds during the occupancy of the tenant, constructive possession of the entire tract.

NOTE.

Judge Reese of the Court of Appeals for the First District, in the case of *Haynes v. Texas & N. O. Ry. Co.*, 111 S. W. 427 (51 C. A. 49), (in which the Supreme Court refused a writ of error), holds, that there is a conflict between the two cases, and follows the rule laid down in the *Bowles* case. Judge Gaines who rendered the opinion in the *Bowles* case evidently thought there was no conflict for he cites the *Read* case as well as the cases of *Texas L. Co. v. Williams*, 51 T. 61, and *Cunningham v. Frandtzen*, 26 T. 34, and distinguishes them. The following cases, while not noticing the conflict, discuss the issue. *Puryear v. Friery*, 40 S. W. 446 (16 C. A. 316); *Parker v. Cockrell*, 31 S. W. 222; *Collier v. Coutts*, 45 S. W. 487; *Texas & N. O. Ry. v. Haynes*, 97 S. W. 850 (44 C. A. 272); *Wood v. Drouthett*, 44 T. 366. Notwithstanding the confusion in the decisions in this state upon the question it appears to be

abundantly settled by the great weight of authority elsewhere, that when a tenant leases the improved part of a larger unoccupied tract neither he nor those claiming under him can acquire by prescription any portion of the unoccupied tract, until he has put the lessor upon notice of his adverse claim.

§ 183. *Rhodes v. Whitehead*, 27 T. 304 (81 Am. Dec. 631).

It may be admitted that the purpose of irrigation is one of natural use, such as thirst of people and cattle, and household purposes, which must absolutely be supplied.

CONTRA: *Watkins Land Co. v. Clements*, 98 T. 578 (86 S. W. 733, 107 A. S. R. 653; 70 L. R. A. 964).

The facts of the case (in *Rhodes v. Whitehead*) did not raise the issue of the right to appropriate the water for purposes of irrigation and the statement by Judge Moore as above quoted is dicta. In all countries and under all circumstances water is necessary for the support of human and animal life and to answer the demands of other domestic uses. Therefore the law denominates its use for such purposes as natural, and accords to it preference over the demands of irrigation and manufacturing. Subject to this right of natural use by other riparian proprietors, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purposes of irrigation, provided such use is reasonable, considering all of the circumstances and conditions under which it is made.

NOTE.

In the *Watkins Land Company* case (*supra*—see Court of Civil Appeals decision *Clement v. Watkins Land Co.*, 82 S. W. 670).

The Supreme Court discusses in addition to the *Rhodes-Whitehead* decision, the following decisions as being cited to sustain the doctrine announced in the *Rhodes* case, to-wit: *Tolle v. Correth*, 31 T. 362 (98 Am. Dec. 540); *Barrett v. Metcalfe*, 33 S. W. 758 (12 C. A. 247); *Baker v. Brown*, 55 T. 377; *Mud Creek Irrigation Co. v. Vivian*, 74 T. 170 (11 S. W. 1078). And it is shown from this discussion and analysis that none of these cases in reality decide that irrigation is a "natural use" of water and therefore of equal right,

with the right to use same for drinking and domestic purposes. That none of them even say so in direct language, except *Toole v. Correth*, which in discussing a general point quotes the language used in *Rhodes v. Whitehead*. The Court declares the language in this case is also dicta. And in effect overruled the doctrine referred to in the cases above mentioned.

The *Watkins Land Co.* case was cited with approval in *Bingham Bros. v. Port Arthur C. & D. Co.*, 91 S. W. 848, and by *Santa Rosa Irrigation Co. v. Pecos River Irrigation Co.*, 92 S. W. 1014. (This last citation is not upon the direct point). And is also followed by *Stacy v. Delesy*, 122 S. W. 300. The Supreme Court granted a writ of error in *Bingham Bros. v. Port Arthur C. & D. Co.* (*supra*), 100 T. 192 (97 S. W. 686), but it was not upon the point under discussion. The doctrine therefore seems to be settled in Texas according to the decisions in the *Watkins Land Co.* case, and the cases cited therein to be as follows:

1st: That the "natural uses" of water in a stream running by or through a riparian owner's land, are water for drinking for persons and stock, and for domestic use. And for these "natural" uses the upper owner has the right to exhaust all of the water if necessary.

2nd: That irrigation and manufacture (such as mills, etc.) are not natural uses, and are in subordination to natural uses, and the upper riparian owner can only appropriate a reasonable amount of the water for such uses, that the right does not extend to land not included in original riparian grants, and that the upper owner can not sell water to non-riparian lands.

See *King's Conflicting Cases*. Vol. 2, sec. 132 and 488.

§ 184. *Rice v. Goolsbee*, 99 S. W. 1031 (45 C. A. 254).

One cannot enter on a survey exceeding 160 acres, and by actual possession of a small part thereof and the maintained assertion of a general and indefinite claim to 160 acres thereof, including his improvements, for ten years, become entitled either to select 160 acres out of the larger survey, or have the court at the end of the limitation period select it for him.

CONTRA: *Louisiana & T. Lumber Co. v. Kennedy*, 126 S. W. 1110 (— C. A. —).

We find no authority in the statutes nor in the decisions of this State which would authorize the occupant of the land,

after the completion of limitation, to arbitrarily survey and set apart for himself such portion of the land as he might choose. In the absence of any provision of the law for separating the land acquired by limitation from the body of the tract the parties would be left to such methods as would apply to any other joint owners or tenants in common of a tract of land, which would be by mutual agreement or by the decisions of some court having jurisdiction to determine the matter.

NOTE.

The first case is by the Court of Appeals for the First District, and tried for second time 134 S. W. 399. The second case is by the Supreme Court, and in so far as they are in conflict the Rice case must be considered as overruled. But the case of McCarty v. Johnson, 49 S. W. 1098, decided by Judge Williams then on the Court of Appeals for the First District, appears to accord with the Rice case for he there says:

"Appellee, when she entered upon the land in controversy, caused a tract of 160 acres to be surveyed and marked off; and of that she took possession, such as she had, and to it, alone, asserted claim. In her answer she alleged title to this specific tract by limitation of ten years and sought judgment for it, but in the alternative, asked that, if this relief be denied her, she recover 160 acres, to be defined under orders of the Court. The court below held that she was not entitled to define the land claimed by her, and instructed the jury, that if they should find the requisite facts to sustain her plea of limitation, they should find for her 160 acres, undefined; and, a verdict in her favor having been returned accordingly, the judgment was rendered, providing for the setting off to her of the land out of the tract sued for by plaintiffs, regardless of her specific claim. In this we think there was error."

In the case of Bering v. Ashley, 30 S. W. 838, also by Judge Williams, then on the Court of Appeals, it is said:

"Where the defendants were in possession of 160 acres, with improvements, for more than ten years, but the evidence fails to sustain the allegation that the land so possessed by them, had been defined by specific metes and bounds for ten years they cannot recover according to such metes and bounds, but the judgment must be 160 acres, to be defined under the direction of the court so as to include their improvements."

It will be readily seen the difficulty of making a practical application of the rule announced by the Supreme Court in the overruling case without running counter to many other decisions. The possessor claiming 160 acres through ten year limitation by reason of actual occupancy of a small tract must describe in his plea the 160 acres claimed. In *Giddings v. Fischer*, 97 T. 188, 77 S. W. 209, Judge Gaines says:

"When a party is in possession of land of which he has held adverse possession for ten years, and claims under no muniment of title or color of title which fixes the boundaries of his claim, he may under our statute assert title to 160 acres without showing actual occupancy of the whole, provided that the tract so claimed embraced the land of which he has had actual possession, and provided further, that he describes in his pleading the 160 acres to which he asserts title, and that he prove upon the trial that while occupying a part he claimed the whole. Not having described the land in any of his pleas, it seems to us that the defendant has no standing in court."

This being true, what is the necessity of describing the 160 acres claimed if the court must set apart to him not the 160 acres claimed, but the 160 acres to be determined by partition. And if the pleader fails to describe the 160 acres then he cannot recover according to the rule in *Giddings v. Fischer*, but he can recover according to the rule announced by Judge Browne in the overruling case.

If a possessor by reason of actual possession of a small tract for a period of ten years is entitled to judgment for 160 acres including the tract actually occupied, without having the intention of claiming any specific 160 acres, then this appears to be contrary to the rule announced in the case of *Titel v. Garland*, 99 T. 201, wherein it is held, "The claimant under statute of limitation should be able to say not only that 'I claim 160 acres out of that land,' but also that he claims some specific tract of land, either more or less than 160 acres."

According to the rule announced in the overruling case, it does not appear to be essential for the possessor to define the metes and bounds of the 160 acres claimed, and this appears to be supported by Judge Stayton in the case of *Craig v. Cartwright*, 65 T. 422, "Is it requisite that notice of the limits to which the disseizor claims shall be given, otherwise than as this is done by an open, visible, and notorious possession, in order that limitation may run as to land not actually occupied? We think not, under the laws of this state," yet this appears to be in conflict with the case of *Bering v. Ashley*, above cited.

As a logical result of the rule announced by the Supreme Court in

the overruling case, a defendant who is asserting the statute of limitation of ten years must plead and prove his defense in one of three ways:

First. Where he is in actual possession of a small tract and claiming 160 acres, more or less, under some written memorandum of title duly registered, then he must sufficiently describe in his answer the land as defined by the instrument under which he holds, and prove actual possession of the small tract for ten years with the intention to claim the whole.

Second. Where he is in actual possession of a small tract and has caused the 160 acres claimed to be surveyed or marked upon the ground, then he must in his plea describe the 160 acres as marked and prove actual possession of the small tract for a period of ten years, and the intention to claim the 160 acres described.

Third. Where he is in actual possession of a small tract and claiming 160 acres which has never been defined, then in his pleading he must describe the entire survey of which the 160 acres is a part, and ask the Court to partition and set aside to him the 160 acres so as to include his improvements, and prove actual occupancy of the small tract for a period of ten years and the intention to claim 160 acres at the time of entry.

The following authorities should be consulted in reference to the question above discussed: *Bracken v. Jones*, 63 T. 184; *Webb v. Lyerla*, 94 S. W. 1095 (43 C. A. 124); *Logan v. Meads*, 98 S. W. 210 (43 C. A. 477); *Carlyle v. Pruitt*, 84 S. W. 372 (37 C. A. 384); *Doom v. Taylor*, 79 S. W. 1086 (35 C. A. 251); *Nativel v. Raymond*, 59 S. W. 311; *Davis v. Houston Oil Co.*, 111 S. W. 219 (50 C. A. 597); *Texas & N. O. Ry. Co. v. Broom*, 114 S. W. 656; *McCarty v. Johnson*, 49 S. W. 1098 (20 C. A. 184); *Vann v. Denson*, 120 S. W. 1020; *Thompson v. Dutton*, 71 S. W. 544; *Smith v. Jones*, 132 S. W. 469; *Downs v. Powell*, 116 S. W. 873; *Parker v. Cameron*, 86 S. W. 647 (39 C. A. 30); *Louisiana & T. L. Co. v. Stewart*, 131 S. W. 199; *Holland v. Nance*, 114 S. W. 346. The last case cited by the Court of Appeals for the first district reviews a number of the cases mentioned above and points out the conflict.

§ 185. *Ricks v. Wofford*, 31 T. 411.

The maxim of the law is, that an erased or altered writing is presumed to be a false writing.

CONTRA: *Kansas M. L. Ins. Co. v. Coalson*, 22 C. A. 67, 54 S. W. 388.

Though alterations of a material character are apparent on face of the instrument offered in evidence, yet if nothing appears to the contrary, the presumption obtains that such alterations were authorized or made at or before delivery.

NOTE.

It is very evident that the judge delivering the opinion in the Ricks case followed the rule of the civil law, and overlooked the fact that the civil law, which was the law of Spain and Mexico, ceased to prevail in this State on the adoption of the common law.

Civil law required that a public document be cleanly written, without blanks, erasures, obliterations, interlineations, or corrections, especially in the substantial parts; corrections, when made, should be authenticated at the foot by the officer, and the abandoned as well as the substituted words must be shown.

See Sec. 266 for extended note on alterations. *Wells v. Moore*.

§ 186. *Ritz v. City of Austin*, 20 S. W. 1029 (1 C. A. 455).

The statute allowing recovery of damages for injuries resulting in death has no application to corporations, for the word "person" used in the statute has reference alone to natural and not artificial persons, and for that reason an action cannot be maintained against a corporation for damages for injuries resulting in death.

OVERRULED: *Fleming v. Texas Loan Agency*, 87 Tex. 239 (27 S. W. 126, 26 L. R. A. 250).

Under the statute authorizing the recovery of damages for injuries resulting in death, a corporation is liable where death results from its own wrongful acts or omissions as distinguished from the acts or omissions of its servants or agents.

NOTE.

The overruling case is followed by the Court of Appeals for the Third District in the case of *Rigdon v. Temple Waterworks Co.*, 32 S. W. 828 (1 C. A. 455), and the overruled case is criticised. The same court in the case of *Searight v. City of Austin*, 42 S. W. 857 (15 C. A. 144), follows the overruled case although decided after the

Supreme Court had passed upon the question in the overruling case. The question in conflict is noticed but evidently the Court of Civil Appeals erroneously contends that under the Supreme Court case a distinction can be drawn between the two cases; that while the action can be maintained against a private corporation it can not be maintained against a municipal corporation. Notwithstanding the Searight case is in apparent conflict with the Fleming case decided by the Supreme Court, that Court refused a writ of error in the Searight case.

§ 187. *Roberts v. Trout*, 35 S. W. 323 (13 C. A. 70).

The character of the title to the homestead is not prescribed by the Constitution and laws of Texas. It may be an absolute or qualified ownership, a fee-simple or equitable estate, or a mere leasehold estate; but it must be something palpable and defined. It is an exemption—that is, something free from forced sale—and this manifestly carries with it the idea that it relates to something which could be sold under execution, in the absence of protection.

CONTRA: *Birdwell v. Burleson*, 72 S. W. 446 (31 C. A. 31).

It is not necessary that a debtor should hold an assignable interest in land in order that he may claim it exempt from execution as his homestead.

NOTE.

The *Roberts* case by the Court of Appeals for the Fourth District and writ of error denied by the Supreme Court, was where the husband without being joined by his wife sold his inchoate right to a homestead donation to a party who afterwards obtained patent therefor. In a suit brought by the husband and wife against the purchaser, the Court properly held they were not entitled to recover, but the language employed in the opinion as above quoted appears to conflict with the last case, and is so considered by the Court of Appeals for the Third District in the contra case.

See Sec. 86, *Hampton v. Gilliland*.

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§ 188. Roberts v. Trout, 35 S. W. 322 (13 C. A. 70).

Where a husband and wife settle on land to acquire a donation homestead therein, but before the expiration of three years the husband alone conveys the land to one who subsequently acquires the patent, the wife cannot assert such homestead interest as against the grantee.

CONTRA: Creamer v. Briscoe, 101 T. 490 (109 S. W. 911, 130 A. S. R. 869, 17 L. R. A. [N. S.] 154n).

See Sec. 260, Votaw v. Pettigrew.

§ 189. Rutherford v. Harris County, 3 W. & W., Sec. 114.

A county is liable for the services of an expert in making post-mortem examinations, at the instance and request of a justice of the peace acting as a coroner ex officio.

OVERRULED: Fears v. Nacogdoches County, 71 T. 337 (9 S. W. 265).

Under our statutes there is no provision for the compensation of a physician summoned to aid in or conduct a post mortem examination at an inquest.

NOTE.

The overruled case is not mentioned by the overruling case, but in the case of Matthews v. Van Zant County, 77 S. W. 960 (77 S. W. 961), by the Court of Appeals for the Fifth District, it is there stated that both the Rutherford case and Monaghan v. Van Zant Co., 3 W. & W., Sec. 198, are impliedly overruled by the Fears case. When the two cases in conflict were decided there was no statute making the county liable to a physician for making a post mortem examination at the request of the coroner, however, in 1893 a law was passed (art. 1024a, Code of Criminal Procedure), making the county liable. Under that statute the case of Polk County v. Phillips, 92 T. 630 (51 S. W. 328), was decided holding with the Rutherford case and contrary to the Fears case, hence the first must be considered reinstated and the second as overruled.

The following cases discuss the liability of counties and more

or less bear upon the question in conflict: County of Galveston v. Ducle, 91 T. 665 (45 S. W. 799); Watkins v. Walker County, 18 T. 585 (70 A. D. 298); San Antonio v. Lewis, 9 T. 69; Frio County v. Earnest, 16 S. W. 1036; Jernigan v. Finley, 90 T. 212 (38 S. W. 25); Travis County v. Jourdan, 91 T. 217 (42 S.W. 543); Clarke v. Presidio County, 85 S. W. 475; Ellis v. Ft. Bend County, 74 S. W. 43 (31 C. A. 596); Barrett v. Hill County, 74 S. W. 811 (32 C. A. 479). See Vol. 1, King's Conflicting Cases, Sec. 124.

§ 190. Roberts v. Connellee, 71 T. 11 (8 S. W. 626).

The qualification, and return of inventory by one of the executors named in a will which provides for independent action under it, has the effect of withdrawing the administration of the estate and the execution of the will from the control of the probate court.

CONTRA: Patten v. Cox, 29 S. W. 182 (1 C. A. 263).

Where the provisions of the will show an intention that the executor was to be independent, and the will was duly probated by the executor, his failure to file an inventory and appraisal and list of claims did not affect his right to an independent administration.

NOTE.

The first case is by the Supreme Court, and the second is by the Court of Civil Appeals for the Fifth District, but never reached the Supreme Court, and for those reasons the first case should be considered the better authority, but for the fact that the second case appears to be supported by Cooper v. Horner, 62 T. 356; Willis v. Ferguson, 46 T. 496; and Campbell v. Cox, 1 W. & W., Sec. 526, wherein it is held that a return of the inventory as required by the statute was not essential in order to render sales by an independent executor valid.

Thus it seems that the power of the independent executor to sell lands belonging to the estate of testator is derived from the terms of the will and its exercise is not dependent upon filing the inventory which he may be required by the court to file at any time for the protection of those interested in the estate.

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§ 191. *Roberts v. Sollibellus*, 10 T. 352.

It is not necessary in a petition for writ of error to state the names of the persons adversely interested, and if the names appear in the bond or other paper in the proceedings the clerk can look to such papers for the names of the persons to be cited, and when necessary the petition for the writ of error may be amended in the Supreme Court, and the names of persons omitted inserted.

CONTRA: *Weems v. Watson*, 91 T. 35 (40 S. W. 722).

See Sec. 98, *Hillebrant v. Brewer*.

§ 192. *Roddy v. White*, 75 S. W. 348 (32 C. A. 422).

An actual bona fide owner residing upon lots in a town contiguous to or within a radius of five miles of public school land is authorized under Art. 4218f to purchase from the State additional lands.

CONTRA: *Conn v. Terrell*, 97 T. 578 (80 S. W. 608).

The owner and resident on a lot of four acres situated in an incorporated town is not such an "owner of other lands" as is entitled to purchase additional sections to his home place under article 4218fff of the Revised Statutes.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, which does not appear to have ever been reviewed by the Supreme Court. It cites the case of *Smith v. Rothe*, 55 S. W. 754, which case however, does not support the principle announced.

The second case is by the Supreme Court and must be understood as overruling the *Roddy* case. The effect of which is to hold that one who owns and resides upon urban lands cannot purchase additional lands, under the statute in question.

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§ 193. *Ross v. Fitch*, 58 T. 151.

Spoken words which impute to a female want of chastity are not actionable per se, and without proof of special damages, there can be no recovery.

CONTRA (Overruled): *Patterson v. Fraser*, 79 S. W. 1077.

Under the law as it now exists in this State, words spoken or written which "falsely and maliciously" or "falsely and wantonly" impute to a female a want of chastity are actionable, without showing special damages arising therefrom.

NOTE.

See Sec. 135, *Linney v. Maton*.

**§ 194. *St. Louis, A. & T. Ry. Co. v. Mackie*, 9 S. W. 451
(71 T. 491), (1 L. R. A. 667), (10 A. S. R. 766).**

A party whose duty it is to perform a service necessary to the fulfillment of his contract and to prevent injury to result from its violation, may in all cases be looked to to fulfill that duty when he has equal knowledge and opportunity, and he cannot be heard to urge, in defense of an action based on his own breach of contract and consequent violation of duty, either for the purpose of defeating the action or lessening the damages, that the injured party might have secured the performance of the contract and thereby have prevented or lessened the injury by paying to him an additional compensation to induce him to perform the duty which he has already been fully paid to perform. And where a person has purchased and paid for first class tickets and has been negligently furnished by the agent of the railway company tickets for only second class accommodations, he may recover damages for both mental and physical suffering arising from the different class of accommodations, notwithstanding he was offered first class accommodations provided he would pay the difference in price, and could have paid same had he so desired and

thereby avoid the damages arising from the inferior accommodations.

CONTRA: *Ft. Worth & D. C. Ry. Co. v. Daggett*, 28 S. W. 525 (87 T. 322).

Where one is injured by the negligence of another, the person injured must use all reasonable means at his command to avert or lessen the damages, which would otherwise result from this negligence, and upon his failure to do so, his damages will be limited to such an amount as would have resulted from such negligence had he used such means to have avoided damage, plus such sum as he would have reasonably expended in the use of such means.

NOTE.

The Mackie case is approved in *Missouri Pac. Ry. Co. v. Martino*, 18 S. W. 1066 (2 C. A. 634); *Gulf, Colorado & S. F. Ry. Co. v. Wright*, 21 S. W. 399 (2 C. A. 463); *Missouri Pac. Ry. Co. v. Martino*, 21 S. W. 781 (2 C. A. 634) and cited with approval in the *Pullman Car Co. v. McDonald*, 21 S. W. 944 (2 C. A. 322), where, however, it is distinguished upon the facts. Approved in *Gulf, C. & S. F. Ry. Co. v. Rather*, 21 S. W. 957 (3 C. A. 72). The case of *Texas & P. Ry. Co. v. Dennis*, 23 S. W. 400 (4 C. A. 90), approves the doctrine announced in the Mackie case, but says that much could be said both upon principle and authority that it is the duty of the plaintiff to pay his fare in order to lessen his damages. Approved in *G. H. & S. A. Ry. Co. v. Kinnebrew*, 27 S. W. 631 (7 C. A. 549); *G. C. & S. F. Ry. Co. v. Halbrook*, 33 S. W. 1028 (12 C. A. 475); distinguished in *Norwood v. G. H. & S. A. Ry. Co.*, 34 S. W. 180 (12 C. A. 560) on the ground that no damage was shown. In *Inman v. St. Louis, S. W. Ry. Co.*, 37 S. W. 37 (14 C. A. 39), an attempt is made to modify the Mackie case, in fact it appears as if this case was more in accordance with the Daggett case. Approved in *Texas & P. Ry. Co. v. Rea*, 65 S. W. 1115 (27 C. A. 549) cited in *Ellis v. Houston E. & W. T. Ry. Co.*, 70 S. W. 114 (30 C. A. 172). The case of *G. H. & H. Ry. Co. v. Scott*, 79 S. W. 642 (34 C. A. 501), cited the Mackie case and attempted to distinguish the facts, showing, however, a distinct leaning to the doctrine in the Daggett case.

In *Texas & P. Ry. Co. v. Payne*, 87 S. W. 330 (122 A. S. R. 603, 70 L. R. A. 946), (99 T. 46), the Supreme Court attempts to distinguish between the facts in the cases and again affirms the doctrine that a passenger is not bound to purchase a ticket in order to avoid

the damages resulting from being put off of the train, because of the wrongful refusal of the conductor to recognize a ticket that he already has.

In *Southern Pacific Co. v. Bailey*, 91 S. W. 820, the Supreme Court refused a writ of error, but in that case the facts showed that the party did not have the money to purchase another ticket.

In *Houston & T. C. Ry. Co. v. Lee*, 123 S. W. 154, the Mackie case is followed and it is held that a party does not have to buy another ticket in order to avoid the damages that would arise from ejection.

In the case of *Texas & P. Ry. Co. v. Arnold*, 40 S. W. 829 (16 C. A. 74), Justice Stephens writing the opinion, it is stated that the doctrine that a party may stand upon his contract and is not bound to expend money to diminish his damages as announced in the Mackie case is in effect overruled by the later decision of the Supreme Court in the Daggett case.

The Daggett case is also cited with approval in *Missouri K. & T. Ry. Co. v. Belcher*, 41 S. W. 706.

In the case of *Gulf, C. & S. F. Ry. Co. v. McCormick*, 100 S. W. 202 (45 C. A. 425), an attempt is made to distinguish between the Mackie case and the Daggett case but in effect the decision follows the Daggett case and holds that a person must use diligence to diminish his damages and cites in support the case of *Russell v. Railway*, 35 S. W. 72 (12 C. A. 627), in which a writ of error was refused by the Supreme Court. In that case the plaintiff was informed before he got on the train that his ticket would not be recognized, nevertheless, he boarded the train, tendered his ticket which was refused, refused to pay his fare and was ejected, held that he could only recover by reason of the delay and the purchase of another ticket and could not recover for his ejection. This case undoubtedly supports the McCormick case and in effect follows the Daggett case, but in *Texas & P. Ry. Co. v. Payne* (supra), the Supreme Court impliedly expresses disapproval of the Russell case, and says that when a writ of error was refused in the Russell case, the point was not so assigned as to properly raise the question. It would seem therefore, that the better rule is, that where a party knows before he boards a train that his ticket will not be recognized, but, notwithstanding his knowledge, boards the train and is ejected, he can only recover damages for his delay and the cost of a ticket, or if he does not know in advance that his ticket will be refused, and he has the money to pay his fare when demanded he should pay his fare, in order to diminish the damages, but if he has not the money to pay his fare, then he may recover damages for his ejection when his ticket is wrongfully refused. The above rule, however, is far from being universally recognized and it is not

believed that the cases can be reconciled by any attempt at distinguishing facts.

Since writing the above in the case of *G. H. & S. A. Ry. Co. v. Wiseman*, 136 S. W. 793, the Court of Civil Appeals for the Fourth District, follows the rule in the *Mackie* case, using the following language: "It is proper to require due care on the part of a person to avoid increasing his own damages; but the reason of the principal ceases when the damage to be avoided is a voluntary injury threatened by the other party who claims the benefit of the doctrine. And as stated by an eminent authority, for the carrier to say to a passenger 'you must submit to extortion in order to prevent me from assaulting you, else you will be deemed in law to have your own damage needlessly,' is equivalent to an attempt by the carrier to profit by its own wrongful traits."

**§ 195 *St. Louis Cattle Co. v. Vaught*, 20 S. W. 855
(1 C. A. 388).**

Where defendant, in fencing its tract of land, inclosed a smaller tract, belonging to plaintiff, and used the entire enclosure for grazing as its own, defendant is liable for rent in trespass to try title, though it never disputed plaintiff's title or right of possession.

CONTRA: *Abbey v. Shiner*, 24 S. W. 91 (5 C. A. 287).

One who encloses his own land, and includes land of another within his fence, does not become liable for the use of the other's land by using the pasture for his stock, and allowing it to run at large therein, nor is there any obligation resting on him to fence off the other's land.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, while the second is by the Court of Civil Appeals for the Fourth District. In *Mann v. Durst*, 90 T. 77 (37 S. W. 311), the Supreme Court recognizes the conflict between the two cases but does not attempt to settle the question.

As will be seen from an examination of the original record in the *Abbey* case a mistake was made by the reporter in saying that a judgment was rendered for plaintiff from which defendant appealed, on the contrary judgment was rendered for defendant from which plaintiff appealed.

Since the cases in conflict were decided the exact question has never been passed upon by any of the Courts in Texas with the possible exception of *Hastings v. O'Connor*, hereinafter cited, although questions very similar in their nature have been decided which may enable the reader to determine which of the cases in conflict is supported by the better reason or the greater weight of authority.

In *Hastings v. O'Connor*, 52 S. W. 567, by the Court of Civil Appeals for the Second District, it is held:

"Where defendant, in fencing land belonging to him, inclosed various tracts belonging to plaintiff, and used the entire inclosure for pasturage, he is liable for the reasonable rental value of plaintiff's land so used, in trespass to try title, though he never disputed plaintiff's title or right to possession."

To this opinion, however, there was a dissenting opinion by Associate Justice Hunter, 53 S. W. 715.

In *Pace v. Potter*, 85 T. 473 (22 S. W. 300), by the Supreme Court it is:

"Plaintiff and defendant owned lands adjoining. By the fences of other land owners the territory occupied by the plaintiff and defendant became surrounded by fences. The defendant put cattle upon his land. Held, that such act and conditions did not make him liable in damages for his cattle pasturing upon the lands of the plaintiff; otherwise, if the defendant had taken and held exclusive possession of the lands of the plaintiff within such an enclosure."

In *Durst v. Mann*, 35 S. W. 949, by the Court of Civil Appeals for the Third District, it is held:

"One who, after the owner has refused to rent land, fences it with her own, and used the enclosed land as a pasture to the exclusion of all others except a third party whose land is also included in the inclosure, will, in an action of trespass to try title against her by the owner, be liable for the rental value of the land as pasturage while so used."

In *Clarendon L. I. & A. Co. v. McClelland*, 86 T. 179 (23 S. W. 576, 1,100, 22 L. R. A. 105n), by the Supreme Court, it is held:

"Where defendant's cattle entered through the fence around plaintiff's range, and communicated a disease to their cattle, defendant is not liable, there being no law in Texas compelling the owner of cattle to restrain them."

In *Dignowity v. Ballantyne*, 3 W. & W., Sec. 194, by the old Court of Civil Appeals it is held, where one herds goats upon the uninclosed pasture lands of another, he is liable for the damage done to the land.

In *Davis v. Davis*, 70 T. 124 (7 S. W. 826), by the Supreme Court, it is held:

"At common law the right of pasturage on uninclosed land vests in the owner of the land, and the right of common in the absence of his consent did not exist. The owner of cattle grazing upon the lands of another was responsible for all damage done by them whether the land was enclosed or not. In Texas every owner of land is entitled to its exclusive use. If he takes no steps to guard against intrusion by the cattle of another he cannot complain if they graze upon it. If he encloses it, his enclosure must be respected, even though it is not enclosed with a statutory fence."

In *Lazarus v. Phelps*, 152 U. S. 81, by the Supreme Court of the United States, it is held:

"An owner of grazing land in Texas, who stocks his land with cattle greatly in excess of the number which can be fed upon it, and permits them to go on and occupy and feed from the grass growing upon unoccupied land of a neighboring proprietor, with no separating fence, becomes liable to the latter for the rental value of his land so occupied."

In *Buford v. Houtz*, 133 U. S. 320, it is held that uninclosed pasture land must be regarded as a common and one allowed to graze his cattle thereon is not liable in damages to the owner.

The facts in both the *Vaught* and *Abbey* cases are strikingly similar. In both the land of the plaintiffs was unoccupied and vacant and entirely surrounded by lands of defendants, who in fencing their lands and following their own lines, thereby enclosed the lands of plaintiffs. Gates were placed in the fences at convenient distances. Defendants used all the lands enclosed for pasturing cattle. Defendant made no claim to the title or possession of plaintiff's lands, and plaintiff made no claim to be permitted to use the enclosure for pasturing cattle nor any demand that his land be left out of the enclosure. In the first case it was held that defendant was liable while in the second case he was held not liable. The first holding appears to be supported by the weight of authority while the second by the better reason.

See 22 L. R. A. 105n.

**§ 196. St. Louis & S. W. Ry. Co. v. Gentry, 95 S. W. 74
(— C. A. —).**

Declares unconstitutional that clause of the "Johnson Grass Statute" allowing damages in addition to penalties. (Acts of 27th Legislature, p. 283).

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CONTRA: Doëppenschmidt v. I. & G. N. Ry. Co., 101 S. W. 1080.

The Supreme Court declares this clause constitutional.

NOTE.

See Sec. 83, G. C. & S. F. Ry. Co. v. Stokes.

**§ 197. St. Louis S. W. Ry. Co. v. Kilman, 86 S. W. 1050
(39 C. A. 107).**

Under Revised Statutes 1895, Art. 4507, requiring that the whistle on a locomotive shall be sounded 80 rods from a public crossing or the railroad shall be liable for damages sustained by reason of such negligence, the failure to so sound the whistle is negligence per se as to any one upon the tracks of said railway and relying upon the railway company to obey the statutory duty, even though they be not at or on the crossing.

CONTRA: Missouri, K. & T. Ry. Co. v. Saunders, 106 S. W. 321 (101 T. 255, 14 L. R. A. [N. S.] 998).

It is not negligence per se to fail to sound the whistle 80 rods from a public crossing as to a person upon the tracks, but not at or near the crossing, because such statute was passed with the idea of protecting those using the crossing of the railway. It is therefore as to such person, error to charge that the failure to so sound the whistle is negligence. The fact that the whistle was not so sounded, might be submitted as any other fact as a circumstance from which the jury, under the facts of the particular case, might conclude that there was negligence.

NOTE.

See Sec. 150, M. K. & T. Ry. Co. v. Taff.

§ 198. - *St. Louis Southwestern Ry. Co. v. Nelson*, 108 S. W. 182
(— C. A. —).

The Act of May 25, 1907, regulating the statement of facts to be sent up on appeal did not change the law as it formerly existed, requiring the statement of facts to be incorporated in the transcript in appeals from the county court, and that provision of the act requiring the original statement of facts to be sent up only applies to appeals from the district court. Hence in appeals from the county court the original statement of facts should not be sent up but copied in the transcript, but in appeals from the district courts the original statement of facts should be sent up without being incorporated in the transcript.

OVERRULED BY: *Missouri, K. & T. Ry. Co. v. Rogers*, 116 S. W. 625 (— C. A. —).

Under the Act of 1907 regulating the sending up of statement of facts on appeal, the act makes no exception in appeals from the county court, but its purpose and object was to require the original statement of facts to be sent up in all cases whether disposed of in the district or county courts.

NOTE.

The overruled case was decided by the court of Civil Appeals for the Sixth District, and the overruling case was decided by the Court of Civil Appeals for the Third District, neither of which cases were passed on by the Supreme Court. However, in the case of *St. Louis S. F. & T. Ry. v. Wall*, 118 S. W. 131, 102 T. 404, the Court of Appeals for the Second District certified the question to the Supreme Court for its decision, and in answering the question Chief Justice Gaines of the Supreme Court held with the overruling case.

The Court of Civil Appeals for the Sixth District in the case of *Houston & T. C. Ry. Co. v. Rogers*, 117 S. W. 1053, is in accord with the overruling case. *International & G. N. Ry. Co. v. Hood*, 118 S. W. 1119 by Court of Civil Appeals for Fifth District and *Vickory v. Brooks*, 121 S. W. 121 by Court of Appeals for Third District, *Bean v. Bird*, 115 S. W. 121 by the Court of Civil Appeals for the Sixth District all hold with the overruling case. The case of *Farris v. Gilder*, 115 S. W. 645, decided by the Court of Civil Appeals for

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the Fifth District on a motion for rehearing, holds with the overruled case and must be considered itself overruled. Notwithstanding the Supreme Court has held with the overruling case that in appeals from both the district and county courts the original statement of facts must be sent up, yet that court in the case of *Texas & Pacific Ry. Co. v. Stoker*, 113 S. W. 3, 102 T. 60, and *Royal Insurance Co. v. Texas & G. Ry. Co.*, 116 S. W. 46, 102 T. 306, and *Hall & Tyson v. First National Bank*, 116 S. W. 47, 102 T. 308, held that though the original statement of facts filed in the trial court did not accompany the record on appeal as required by law, but was copied into it, yet appellant waived its right to take advantage of the defect by failing to object thereto before submission of the cause.

§ 199. *San Antonio & A. P. Ry. Co. v. Burns*, 87 S. W. 1144
(— T —).

It is intimated (though not necessary to decision of the cause), that the "Johnson Grass Statute" (Acts of 27th Legislature, p. 283) so far as the damage clause is concerned is unconstitutional.

CONTRA: Doeppenschmidt v. I. & G. N. Ry. Co., 101 S. W.
1080 (— T. —).

It is decided that said clause is *not* unconstitutional.

NOTE.

See Sec. 83, G. C. & S. F. Ry. Co. v. Stokes.

§ 200. Samuelson v. Bridges, 25 S. W. 636 (6 C. A. 425).

Improvements made upon the separate property of the wife out of the community estate take the character of the realty, and become her separate property and are not liable for the husband's debts.

CONTRA: Maddox v. Summerlin, 92 T. 483 (49 S. W. 1033).

A house built upon land which is the separate property of the wife and paid for with funds of the community does not

become her separate property, but remains a part of the community estate and is liable to sale for the husband's debts.

NOTE.

The first case is by the Court of Civil Appeals for the Fourth District, but does not appear to have reached the Supreme Court. The second case is by the Supreme Court.

In *Neaves v. Griffin*, 80 S. W. 420, by the Court of Civil Appeals for the Fourth District, the conflict between the two cases is pointed out, and the *Maddox* case is followed.

The case of *Bullock v. Sprowls*, 54 S. W. 659, by the Court of Civil Appeals for the Fifth District, appears to support the *Samuelson* case, for it is there said:

"Where improvements are made upon the separate property of one of the spouses with community funds, such improvements become a part of the realty, and belongs to the separate estate. The community cannot assert a claim by reason of such improvements that would affect the title to the land."

The case of *Blum v. Rogers*, 71 T. 668 (9 S. W. 595), by the Supreme Court also appears to support the *Samuelson* case for it is therein said:

"The levy and sale would only affect the community interest in the land, of course with right to partition—such partition upon basis of ownership in the land at its acquisition. The creditor could seize and subject to sale the community interest in the land. This did not include the right to an account between the wife and the community in order to reach improvements upon her part. Owning the land, she owned the improvements upon it."

King v. Summerville, 80 S. W. 1050 (C. A.) by the Court of Civil Appeals for the Fourth District follows the Supreme Court's opinion in the *Maddox* case and says:

"Improvements erected with community funds on the separate estate of husband and wife do not become a part of the separate estate, but remain community, as was the money with which they were erected."

The following also support the *Maddox* case: *Furrh v. Winston*, 66 T. 521, 1 S. W. 527; *Welder v. Lambert*, 91 T. 510, 44 S. W. 281; *Bond v. Hill*, 37 T. 626; *Robinson v. Moore*, 20 S. W. 994, 1 C. A. 93; *Rice v. Rice*, 21 T. 58; *Cameron v. Fay*, 55 T. 58; *Day v. Stone*, 59 T. 615; *Clift v. Clift*, 72 T. 144, 10 S. W. 338; *Sanburn v. Deal*, 22 S. W. 192, 3 C. A. 385.

To maintain the principle announced in the *Samuelson* case and those following it, is to permit the husband while in debt to convert

community property into the separate property of the wife and thereby deprive the community creditors of their just debts. Hence when a community creditor causes an execution to be levied upon the wife's separate real estate which has been improved with community funds, the wife ought not to be permitted to enjoin the sale (as was done in the Samuelson, Bullock and Blum cases) until she has paid or offered to pay the debt to the amount of the improvements. Even though the improvements could not be reached by a levy and sale under execution, still the community creditor has an equitable lien upon the wife's separate estate for the community funds expended in erecting improvements thereon, and this a court of equity in a proper proceeding will enforce. *Robinson v. Moore*, 20 S. W. 994 (1 C. A. 93), and cases therein cited. Judge Brown in the Maddox case says:

"We are not prepared to say that a court of equity can not so adjust the interest of the parties as to fully protect the wife's title to the land and all the benefits derived from it and at the same time give to the creditors the benefit of the property which ought to be applied to the payment of their debts."

Therefore the Samuelson, Bullock and Blum cases must be considered as impliedly overruled.

§ 201. *Sanders v. Benson*, 114 S. W. 435 (51 C. A. 590).

When an appeal is taken under article 1401, Revised Statutes, the record on appeal must affirmatively show that the proof, if made before the court, was made when the court was in session, and that an order was entered showing that the action was that of the court, and a record on appeal, showing that the affidavit of inability was approved by the judge trying the case at the time when the court may or may not have been in session, and not showing that the proof was made before the county judge of the county of appellant's residence, is insufficient.

OVERRULED BY: *Smith v. Buffalo Oil Co.* 99 T. 77, 89 S. W. 659.

See Sec. 208, *Sidoti v. Rapid Transit Co.*

§ 202. Scanlon v. Campbell, 55 S. W. 501 (22 C. A. 505).

Where the record is regular upon its face, and the judgment shows that service was had upon the defendant, but in fact no service was had, the court did not acquire jurisdiction to render the judgment and same is void. All purchasers under such a judgment bought with notice of such vice, whatever the recitals in such judgment might be.

CONTRA: Carpenter v. Anderson, 77 S. W. 291 (33 C. A. 484).

Where a record is regular upon the face and the judgment shows that legal service was had upon the defendant, but in fact no service was had, the judgment is not void but merely voidable. And an innocent stranger, who pays value for land sold under such judgment may deal with such record as an absolute verity.

NOTE.

In both of the above cases a writ of error was refused by the Supreme Court. The fact that the Supreme Court so refused a writ of error in the Scanlon case is observed and commented upon in Carpenter v. Anderson, and the conclusion reached that the Supreme Court must have refused the writ, because in its opinion a right conclusion was reached upon the entire case, and not because it adopted the doctrine announced in the Scanlon case. And as previously stated the Supreme Court refused a writ of error in the Carpenter case. In Williams v. Young, 90 S. W. 940 (41 C. A. 212), a decision by the same court (First Court of Civil Appeals), that rendered the decision in Carpenter v. Anderson, reference is made to this case and the very language of same quoted in re-affirming the doctrine "That rights acquired under such judgments by innocent strangers for value will not be disturbed; the wronged party being relegated to his remedy against the plaintiff who procured the false recital to be made." The Supreme Court also refused a writ of error in this latter case. Of course there can be no confusion or dispute as to the status of such a judgment where the action is a direct attack upon the validity of the judgment in an action between the same parties and where the rights of an innocent third party has not intervened. The judgment would in such an action unquestionably be declared invalid. Much of the confusion surrounding the point comes from the careless use of the word "void" when

only voidable is meant. Unquestionably a judgment of the court in a matter where it had no jurisdiction of the *subject matter* would be "void," but where it has jurisdiction of the "subject matter," and under certain circumstances, viz., when the defendant is served with process, had jurisdiction over the person, and the judgment itself recites that the defendant was served, in other words that condition has been complied with, the better opinion seems to be that the judgment is not void, but voidable. The distinction is very important, for if void, then of course it is void even as against an innocent purchaser thereunder, while if merely voidable, the innocent purchaser without notice of the want of service should be protected.

Argument of considerable force can be advanced and appeals to public policy are made by both sides.

Judge James in the Scanlon case, in effect asks the following questions: How can a judgment be anything but void when no service has been had upon the defendant? How can you deprive a person of property without process of law? Is not every person chargeable with knowledge of the absence of jurisdiction whether effecting the subject matter or person? How then can it be said that a person is an innocent purchaser without notice, where the defendant had not been served?

Judge Gill in the Carpenter case in effect says that a judgment in a case where the Court has not jurisdiction of the subject matter is of course a nullity, but that the jurisdiction or lack of it, in such a case does not depend upon any fact to be judicially determined by the court, whereas when the matter of jurisdiction of the person is concerned, the fact of service must necessarily be determined by the court judicially, and having so determined the question, it becomes a regular judgment and can not be collaterally impeached. That it is true that a court has no power to render a judgment in the absence of jurisdiction over the person of the defendant, but once adjudged, the existence of the fact can not be questioned, except in a direct attack. Judge Gill admits that this doctrine might work hardship in individual cases, but points out that the defendant in such a case would have his remedy against the plaintiff who caused the judgment to speak falsely, and that if the rule was otherwise public confidence in the verity of public records would be shaken or destroyed, and if the rule in the Scanlon case was adopted, purchasers would not buy at judicial sales or else would buy at such low prices as would justify the risk.

Judge Gill cites the following cases as supporting his views in the Carpenter case: *Lawler's Heirs v. White*, 27 T. 251; *Fitch v. Boyer*, 51 T. 338; *Davis v. Robinson*, 70 T. 395 (7 S. W. 51); *Heck v. Martin*, 75 T. 472 (13 S. W. 51; 16 A. S. R. 915). Upon examina-

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tion these authorities seem in point and Judge Gill gives as his deliberate opinion that after an examination of the authorities cited by Judge James, that he does not believe they support the doctrine announced.

The Supreme Court having refused writs of error in both cases, we can not be sure what view it will take of the question when it finally reaches that Honorable body.

§ 203. *Scarborough v. Eubanks*, 52 S. W. 569 (C. A.).

Under the Constitution and Statutes allowing contests of election, other than for officers, every matter effecting the validity of the election, including the sufficiency of the petition on which the election was ordered, may be determined.

CONTRA: *Norman v. Thompson*, 96 T. 250 (72 S. W. 62).

See Sec. 181, *Rayner v. Forbes*.

§ 204. *Schleicher v. Gatlin*, 85 T. 270 (20 S. W. 120).

Occupying land under the belief that it is vacant, with the intent to obtain title from the State, is not adverse possession under the statute of limitation of ten years, for in order to make his possession adverse, it must be against the claim of all other persons.

OVERRULED BY: *Price v. Eardley*, 34 C. A. 60, 77 S. W. 416.

Under the statute giving title to one who has adverse possession of land for ten years, his possession is adverse to the true owner, though it is under the erroneous belief that it is vacant land, but with the intention of acquiring title from the State under the pre-emption law.

NOTE.

The overruling opinion was rendered by Associate Justice Fly of the Fourth District and writ of error refused by the Supreme Court. While it does not expressly overrule the *Gatlin* case subsequent cases consider it, as having that effect.

Hoencke v. Lomax, 119 S. W. 842, 102 T. 487, by the Supreme Court, contains an intimation that the overruling case will be followed. Judge Williams delivering the opinion says:

"We take this occasion to say that, when a case shall be presented in which it becomes necessary to determine whether or not a possession is adverse to the true owner from its commencement, which is taken and held in the belief that the land belongs to the State and with the purpose to acquire it lawfully from the State, we shall not consider that question concluded. In all cases which we now recall in which the question has been raised in applications for writs of error, it has been deemed immaterial, as it is in this case."

Morgan v. White, 110 S. W. 492 (50 C. A. 318), decided by the Court of Appeals for the Third District, and a writ of error denied by the Supreme Court holds with the overruling case.

Texas & N. O. Ry. v. Haynes, 97 S. W. 849, 44 C. A. 272, by the Court of Appeals for the Fourth District approves and follows the overruling case.

Flewellen v. Randall, 74 S. W. 49, 32 C. A. 361, by the Court of Civil Appeals for the Fourth District is in accord with the overruling case.

Williams v. Texas & N. O. Ry. Co., 114 S. W. 877, 52 C. A. 217, by the Court of Appeals for the Third District followed the overruling case, this case, however, was not passed on by the Supreme Court as writ of error was dismissed for want of jurisdiction.

Village Mills v. Manley, 94 S. W. 102, 42 C. A. 420, by the Court of Appeals for the Third District follows and expressly approves the overruling case.

Hayworth v. Williams, 117 S. W. 1197 (C. A.), by the Court of Appeals for the Second District approves and follows the overruling case.

Sellers v. Simpson, 115 S. W. 888 (C. A.), by the Court of Appeals for the Second District approves and follows the overruling case, and writ of error denied by the Supreme Court.

Weiss v. Goodhue, 102 S. W. 793, 46 C. A. 142, by the Court of Appeals for the First District while not necessary to the decision of the case, cites with approval the overruling case.

Converse v. Ringer, 6 C. A. 58, 24 S. W. 705, by the Court of Appeals for the Third District is in accord with the overruling case and altho formerly expressly overruled (*King's Conflicting Cases*, Vol. 11, Sec. 87), but must be now considered reinstated.

Cartwright v. Pipes, 29 S. W. 690 (9 C. A. 309), by the Court of Appeals for First District holds with the overruling case.

Longley v. Warren, 33 S. W. 304 (11 C. A. 269), by the Court of

Civil Appeals for the Second District, writ of error denied by the Supreme Court, criticises the Gatlin case, and is in accord with the overruling case.

Hartman v. Huntington, 32 S. W. 563 (11 C. A. 130); Jones v. Weaver, 122 S. W. 619 (C. A.), by the Court of Civil Appeals for the Second District; Newton v. Alexander, 44 S. W. 416 (C. A.), by the Court of Civil Appeals for Fifth District, writ of error denied by the Supreme Court; Beaumont Lumber Co. v. Ballard, 23 S. W. 920 (C. A.); Norton v. Collins, 20 S. W. 1113 (1 C. A. 272); Blum v. Rogers, 32 S. W. 713 (11 C. A. 184); each by the Court of Civil Appeals for the Second District, all hold with the overruled case, to the effect that one in possession under the mistaken belief that the land held is vacant state land cannot acquire title by limitation against the true owner.

The case of Cartwright v. Pipes, 29 S. W. 691 (9 C. A. 309), by the Court of Civil Appeals for the Fifth District, while apparently holding with the overruling case, says:

"Our opinion is that the fact that a person in possession of land belonging to another believes that it is public land should go to the jury as any other fact showing intent, in order to determine the character of the possession."

The latest expression is from the Supreme Court in the case of Smith v. Jones, 132 S. W. 469, wherein a middle ground is taken practically leaving the conflict still unsettled, the Court says:

"A possession taken and held under mistaken belief that the land is public domain, with the purpose of acquiring it by complying with the law authorizing the acquisition of public land, is insufficient to show that the possession was hostile; but the possession of one holding in subordination to the state is not necessarily inconsistent with a holding in hostility to others, and, where the possessor openly disputes the claims of others while asserting the belief of title in the state, his possession is adverse as against other claimants."

From the foregoing authorities it will be seen that our courts of last resort have repeatedly changed their opinion upon the question in conflict. They first held as announced in the Converse case, that one in adverse possession of state land can acquire title by limitation against the true owner. They again held, as in the Gatlin case, that the adverse possessor under the circumstances above stated could not acquire title by limitation against the true owner. Now they go a part of the way back to the original holding and say that notwithstanding his possession may be taken and held under the belief that it is vacant unappropriated public domain, and occupied with the intention of acquiring it by preemption or pur-

chase from the State, nevertheless, if while recognizing the title as in the state he holds in hostility to others, his possession for the requisite period will give him title by limitation against the true owner.

§ 205. *Schultze v. Schultze*, 66 S. W. 56 (C. A.).

In an action by a divorced wife to collect an allowance made to her in the divorce decree for the support of their child, the same did not create a lien upon the husband's property and the trial court acted rightly in refusing to appoint a receiver.

CONTRA: *Bemus v. Bemus*, 133 S. W. 503 (— C. A. —).

In a suit between a divorced husband and wife for the custody and maintenance of their minor children, where the children were awarded to the wife and the husband charged with their maintenance held: It being proper to provide for the maintenance of the children, the court had power to create a trust in the property of the husband for that purpose.

NOTE.

The above two cases were decided by the Court of Civil Appeals for the Fourth District and both by Chief Justice James, and notwithstanding the conflict a writ of error was denied by the Supreme Court in both.

It seems to be abundantly settled by authorities that in a divorce proceeding between the husband and wife, the court has the power in partition of the property between the spouses to provide for the support, education and maintenance of the minor children. *Fitts v. Fitts*, 14 T. 443; *Trimble v. Trimble*, 15 T. 18; *Simmons v. Simmons*, 23 T. 344; *Rice v. Rice*, 21 T. 58; *Ligon v. Ligon*, 87 S. W. 839 (39 C. A. 392); *Boyd v. Boyd*, 54 S. W. 380 (22 C. A. 200).

But such provision for the support of the children in a divorce suit, whether the custody be given to father or mother, should be with reference to the property of the parents, and not by way of a charge in a gross sum or periodical payments of money. *Pape v. Pape*, 35 S. W. 479 (13 C. A. 99); *Defee v. Defee*, 51 S. W. 274; *Bond v. Bond*, 90 S. W. 1128 (41 C. A. 129); *Barry v. Barry*, 131 S. W. 1143. In the case of *Kirkwood v. Domnau*, 80 T. 645 (16 S. W. 428, 26 A. S. R. 770), it is said: The husband's interest in the property can be so charged only in the divorce suit and as a part of

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the decree of divorce, it not having been then done, the former husband and wife stood towards each other after the decree of divorce as if they had never borne that relation to each other. In the case of *Holloway v. Shuttles*, 51 S. W. 293 (21 C. A. 188); *Wapples v. Mithcell*, 25 S. W. 201 (12 C. A. 90); *Ryan v. Ryan*, 61 T. 474, it is held that where the husband is indebted to the wife and she has no interest in his property, the wife is the simple creditor and can not secure the appointment of a receiver over his property. In the case of *Cahn v. Johnson*, 33 S. W. 100, it is held that a court of equity will not grant its aid by appointing a receiver in favor of a general creditor who has acquired no lien upon the property. In *Speer on Married Women*, Sec. 359, it is said, if the court attempts to provide for the support of children by an allowance against the husband, the judgment can be enforced by execution only since such decree creates a debt against him.

By the foregoing authorities it will be seen that the principle is announced in the *Bemus* case is not sustained by authority.

§ 206. *Scott v. Mexican National Ry. Co.*, 18 S. W. 137 (4 W. & W., Sec. 287).

When the jurisdiction of the court depends upon the amount in controversy, the safe rule is to depend upon the amount of the judgment prayed for.

CONTRA: *Times Publishing Co. v. Hill*, 81 S. W. 806 (36 C. A. 389).

See Sec. 3, *Alexander v. Thompson*.

§ 207. *Scottish Union & Natl. Ins. Co. v. Weeks Drug Co.*, 118 S. W. 1086 (C. A.).

Under a clause in an insurance policy reading as follows, "This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured," held that where the insured becomes aware of an attempt to burn down the premises and fails to inform the insurance company of that fact, it is a question for the jury whether such fact was such an increase of hazard as would forfeit the policy under such provision.

CONTRA: *Williamsburg City Fire Ins. Co. v. Weeks Drug Co.*,
132 S. W. 121 (T.).

The clause mentioned in the *Weeks Drug Co.* case, does not apply to such a state of facts as is described therein; the risk intended to avoid the policy being one of the means creating which is to be within the control or knowledge of the insured, and among the risks against which it is the purpose of insurance to guard insured being incendiarism and mere negligence.

NOTE.

A writ of error was denied by the Supreme Court in the *Weeks Drug Co.* case, but as has been so pointed out by the Supreme Court, this did not necessarily mean that it endorsed all that was decided in that case. The Supreme Court may have concluded that it was decided rightly upon other grounds. Subsequently the Court of Civil Appeals for the First District in *Williamsburgh City Fire Insurance Co. v. Weeks Drug Co.*, not agreeing with the Court of Civil Appeals of the Fourth District in the *Weeks* case, certified the question to the Supreme Court, and it was answered as set forth above, thus overruling the construction placed upon this clause in the *Weeks* case. (See also *Williamsburg City Fire Ins. Co. v. Weeks Drug Co.*, 133 S. W. 1097).

The Court of Civil Appeals for the Sixth District in the case of *Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465, without referring to the *Weeks* case had expressed the contrary view, upon original opinion, afterwards on rehearing mention is made of the *Williamsburg* case as being confirmatory of its opinion as originally written.

**§ 208. *Sidoti v. Rapid Transit Ry. Co.*, 79 S. W. 326
(35 C. A. 131).**

Under the statute requiring a party, in order to avail himself of the privilege of prosecuting a writ of error without bond, to make proof of his inability to pay costs or give security, before the county judge of his residence, or the "court trying the case," the record, on writ of error, must affirmatively show that the proof of inability to pay costs, when not made before the county judge, was made before the court trying the case, when such court was in session, and that an order or

judgment was entered of record, showing the action taken; and an endorsement on the affidavit of plaintiff in error reciting that he had made strict proof of his inability to pay costs, etc., signed by the judge before whom the case was tried, is insufficient.

DISAPPROVED BY: *Smith v. Buffalo Oil Company*, 99 T. 77 (89 S. W. 659).

An appeal taken without giving bond may be sustained under Article 1401, Revised Statutes, by appellant's affidavit of inability to pay or secure costs, taken before the district judge trying the case, embraced in the record and shown by evidence in the appellate court to have been taken in open court, though the affidavit and transcript does not show such fact, nor contain any entry or order showing action of the district court upon it.

NOTE.

The case of *Sanders v. Benson*, 114 S. W. 435 (51 C. A. 590), by the Court of Civil Appeals for the Second District, holds in substance that the record from the court below filed in the court of appeals must show affirmatively an order, entered of record while the court was in session, making proof of inability. This holding is in accord with the overruled case, and in conflict with the Supreme Court in the *Smith* case, and must be considered overruled.

The following cases are in accord with the overruling case:

Emerson v. Missouri, K. & T. Ry. Co., 82 S. W. 1060, 37 C. A. 110, writ of error refused by Supreme Court.

Lambert v. Western Union Tel. Co., 47 S. W. 476, 19 C. A. 415.

Wood v. St. Louis, S. W. Ry. Co., 97 S. W. 323, 43 C. A. 590.

Green v. Hewitt, 118 S. W. 170.

Thames v. Chitwood, 60 S. W. 345, 24 C. A. 389.

Penley v. Berry, 95 T. 72, 65 S. W. 32.

Accousi v. Stowers Furniture Co., 87 S. W. 861.

Murray v. Robuck, 89 S. W. 781.

The overruling case decided by the Supreme Court established a radical change of practice governing appeals under article 1401, when proof is made of inability, before the trial judge while court is in session. In the first place, no proof of inability to pay cost, other than the affidavit is required, where there is no contest. In

the second place, no order of the court is required to be entered, manifesting the court's action in taking and authenticating the affidavit. In the third place, the record of the court below need not affirmatively show that the affidavit was made in open court. In the fourth place, while it is necessary that the affidavit be made and authenticated in open court, this fact, if true, may be shown by proof in the appellate court.

§ 209. *Simons v. County of Jackson*, 63 T. 428.

A county treasurer is liable on his bond for money coming into his hands belonging to the school fund in a suit by the county or by some one "for the use and benefit of the county."

CONTRA: *Jernigan v. Finley*, 90 T. 205 (38 S. W. 24).

A county treasurer cannot be sued upon his bond by any one "for the use and benefit of the county" nor by the county itself, to recover money coming into his hands belonging to the school fund, because the county is neither the owner nor the trustee of these funds. They belong to the school fund and the county treasurer in receiving them is a "State officer" and not a "County Officer." The suit should be filed "for the use and benefit" of the State.

NOTE.

Burke v. County of Galveston, 76 T. 267 (13 S. W. 455); and *Kempner v. Galveston County*, 73 T. 216 (11 S. W. 188), follow the *Simons* case. In *Connor v. Zackry*, 117 S. W. 177 (C. A.), the conflict is recognized but follows the rule in the *Jernigan* case.

In *Travis County v. Jourdan*, 91 T. 217 (45 S. W. 543), the Supreme Court cites the *Jernigan* case with approval upon the proposition that "a county officer is not an officer of the State government" within Rev. Stat., art. 946, providing that the Supreme Court may issue writs of mandamus against "any District Judge, or officer of the State government," although such officer may perform certain functions of State. At first glance this would appear to be contrary to what the *Jernigan* case actually held, but the difference seems to be, that while a county officer is not an officer of state against whom a mandamus would run, still when he collects money for the school fund, he is performing state functions, and must be sued "for the use and benefit of the State." In *House v. City of*

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Dallas, 96 T. 594 (74 S. W. 901), the Jernigan case is expressly approved, and it would seem to be the settled doctrine.

§ 210. Simmons v. Hewitt, 87 S. W. 188 (C. A.).

In order to establish the existence of a lost deed there must be a distinct assertion of ownership under the alleged deed coupled with some sort of possession to show that the party asserting its existence acted under it in such a substantial and open way, and one which, if unauthorized, would in the nature of things have provoked a protest from the owner.

LIMITED: Arthur v. Ridge, 89 S. W. 15 (40 C. A. 137).

In countries where lands are largely unsettled, and actual possession is the exception, the doctrine that possession is necessary to establish the existence of a lost deed does not apply.

NOTE.

Both of the above cases are by the Court of Civil Appeals for the First District, and in each a writ of error was denied by the Supreme Court. Associate Justice Gill in the limiting case says with reference to the limited case:

"Our intention has been called to an expression used by this Court in the opinion in *Simmons v. Hewitt* bearing upon the point under discussion and inconsistent with the views here expressed. The expression was not necessary to the decision of that case, and the rule was stated too broadly."

In *Garner v. Lasker*, 71 T. 431 (9 S. W. 332), and *Johnson v. Shaw*, 41 T. 433, both by the Supreme Court, it is held, that the power to execute a deed will be presumed where possession had not followed the deed.

In *Stroud v. Springfield*, 28 T. 664; *Holmes v. Coryell*, 58 T. 668; *Lunn v. Scarborough*, 24 S. W. 846 (6 C. A. 15), it is held, that possession is not necessary to the admission in evidence of proof of a lost deed.

In *Glasscock v. Hughes*, 55 T. 476, it is held, that the payment of taxes upon wild land is equivalent to proof of possession.

In *Baldwin v. Goldfrank*, 88 T. 249 (31 S. W. 1064), it is held, "the presumption of a grant or of a power from the claim of ownership upon the one side, and acquiescence upon the other, rests rather upon the acquiescence of the latter than upon the claim of the former. Without proof of such unequivocal acts of ownership

long continued and brought home to the adverse party, acquiescence in the claim can not be established. The case presented is that of a deed which purports to have been executed by virtue of a power of attorney, and which, it is true, is forty years old; but under which no claim appears to have been asserted for a quarter of a century. The presumption would seem to be not that the power did in fact exist but rather that it did not exist, or that for some other reason not disclosed, no title passed by the deed."

In *Ammon v. Dwyer*, 78 S. W. 639, by the Commission of Appeals, it is held, "A deed thirty years old or over, coming from the proper custody and free from suspicion, is admissible in evidence as an ancient instrument, without proof of accompanying possession or other acts of ownership corroborative of its genuineness."

In *West v. Houston Oil Co.*, 120 S. W. 229 (C. A.), by the Court of Civil Appeals for the Fourth District, it is held, "In some jurisdictions possession under the document is regarded as a requirement, but such condition does not obtain in this state though it may be considered by the jury as a circumstance in corroboration of the genuineness of the document."

In *Kellogg v. McCabe*, 38 S. W. 542 (14 C. A. 598); *Chamberlain v. Showalter*, 23 S. W. 1017 (5 C. A. 226); *Williams v. Hardie*, 21 S. W. 267, it is held, "It is not necessary to prove that the parties to the deed have acted on it, in order to make it admissible to the jury."

In so far as the cases heretofore cited hold, that a grant or power will be presumed after thirty years without the assertion of title or other acts of ownership, they are in direct conflict with the decision of the Supreme Court in the *Baldwin* case and against the great weight of authority in Texas and elsewhere.

§ 211. *Simmons & Co. v. Terry*, 79 S. W. 1103 (C. A.).

Under the Anti-trust Law of 1899 (Laws of 26th Legis. 246, Ch. 146), making void any agreement to limit the trade in any article or limit competition, a contract whereby a manufacturer of vehicles agreed with a dealer not to sell to any other person in certain cities, was void.

CONTRA: *Norton v. W. H. Thomas & Sons*, 99 T. 578 (91 S. W. 780; 23 L. N. S. 1277).

See Sec. 256, *Troy Buggy Works v. Fife*.

§ 212. *Smart v. Panther*, 95 S. W. 679 (42 C. A. 262).

On final partition and distribution of a decedent's estate the heirs are not required to account for property received from the decedent in his life time by way of gift in the absence of evidence that the same was intended as an advancement.

CONTRA: *Lott v. Kaiser*, 61 T. 665.

The law presumes property conveyed by deed from the parent to the child for an express consideration of natural love and affection, to take effect *in presenti*, to be a gift by way of advancement. Like any other deed, its language is conclusively presumed when unambiguous, and in the absence of accident, mistake or fraud, to evidence the intention of the grantor.

NOTE.

The following authorities appear to be in accord with the rule announced in the last case: *Parker v. Parker*, 10 T. 88; *Sparks v. Spence*, 40 T. 701; *Belcher v. Fox*, 60 T. 531; *Brown v. Elmendorf*, 87 T. 60; *Long v. Moore*, 48 S. W. 46, 73 T. 273; *Wilson v. Helm*, 59 T. 680; *Scoby v. Sweet*, 28 T. 725; *Burleson v. Burleson*, 28 T. 418; *Ruiz v. Campbell*, 26 S. W. 295; *Harris v. Reed*, 47 T. 528.

The case of *Smart v. Panther* is by the Court of Appeals for the Fifth District but was never passed upon by the Supreme Court. The principle therein announced appears to be sustained by the following cases: *Wilkinson v. Wilkinson*, 20 T. 244; *Johnson v. Harrison*, 48 T. 265; *Magee v. Rice*, 37 T. 501.

The *Lott* case and those in accord with it, is a judicial construction of Art. 1694, R. S., and are based upon the theory that in the absence of facts showing that the decedent made the donation with no intention that the donee should account for it on final distribution of his estate, the presumption of advancement would prevail, because it tends to create that equality sought to be maintained in the statute of descent and distribution. See kindred question discussed in Vol. 1, Sec. 246.

As to what constitutes an advancement when the heirs are suing a purchaser from the community survivor, the decisions seem to draw a distinction as to the degree of proof required between advancements made from the community estate and advancements made from survivor's separate estate. In the one case gifts from survivor from the community estate are *prima facie* advancements, while in the other gifts from the survivor out of his separate estate

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are not so regarded. See *Sparks v. Spence*, 40 T. 696, and *Connor v. Huff*, 48 T. 365.

§ 213. *Snowden v. Rush*, 76 T. 197 (13 S. W. 189).

It is well settled that the payment of taxes and possession must concur, but we do not understand by this that the taxes must be actually paid during the continuance of the possession.

CONTRA: *Capps v. Deegan*, 92 T. 600 (50 S. W. 1117).

Where the evidence shows that defendant in error failed to pay the taxes on the property in controversy for the years 1890 and 1891 until 1892, the plea of the statute of limitation of five years is not sustained.

See Sec. 32, *Capps v. Deegan*.

§ 214. *Snyder v. Wiley*, 59 T. 448.

When a suit is brought in the district court to foreclose a lien alleged to exist on land for an amount which of itself would not be sufficient to give that court jurisdiction, and on the trial it is ascertained that no lien exists, the proper practice is to dismiss the cause for want of jurisdiction.

OVERRULED: *Ablowich v. Greenville Natl. Bank*, 95 T. 429 (67 S. W. 881).

See Sec. 34, *Carter v. Hubbard*.

§ 215. *Solomon v. Huey*, 1 U. C. 265.

The burden of proof is upon the plaintiff where want of consideration is set up as defense to suit on a note, but the production of the note is prima facie evidence of consideration, which, if not rebutted, is sufficient to maintain the plaintiff's case.

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OVERRULED: Gutta Percha Mfg. Co. v. City of Cleburne, 102 T. 36 (112 S. W. 1047).

See Sec. 37, Clark v. Hill.

§ 216. Spence v. Mitchell, 96 T. 43 (70 S. W. 73).

Act 1899, validating certain awards of school lands where the purchaser has made actual settlement and first payment within six months after the application to purchase, is not applicable to a purchaser of additional lands.

CONTRA: Taylor v. Lewis, 85 S. W. 1011 (38 C. A. 390).

If, by making actual settlement upon his home section within six months after the date of his application to purchase same, the sale based thereon was validated by the operation of the statute referred to, we see no reason for holding that the sale of the additional lands based upon the ownership of such home section was not also validated. It would seem to follow that, if the sale of the home section was validated, such validity dated from the time of his application to purchase, and that it would be a sufficient basis to support the award of the additional lands.

NOTE.

The first case is by the Supreme Court, opinion rendered November 10, 1902. The second case is by the Court of Civil Appeals for the Second District, opinion rendered on February 25, 1905, in which a writ of error was denied by the Supreme Court.

The law under which the purchases were made in the cases in conflict, authorized an actual settler to purchase a home section at the price at which it was put upon the market by making application to the commissioner to purchase, making the cash payment, executing his obligation to the state for the payment of the balance and making actual settlement on the land. When this was done he could buy additional sections within a radius of five miles of the home section and a forfeiture of the home section for any reason worked a forfeiture of the additional sections.

That part of the validating act commonly known as the Decker Healing Act, the construction of which occasions the above conflict, is as follows:

"That any application who has, prior to the first day of January, 1889, made application to purchase public free school land, university or asylum lands, and within six months after the date of such application to purchase made actual settlement and first payment thereon and executed his obligation for the balance of the purchase money, and the said land has been awarded to such applicant by the commissioner of the general land office, under the several acts of the legislature relating to the sale of such lands, and the said award and account as to interest payments on such land is in good standing, such award and sale is hereby validated."

Ordinarily where a decision of a Court of Civil Appeals comes in conflict with a decision of the Supreme Court, that of the Court of Civil Appeals must be considered as overruled, but as the Supreme Court reviewed the Taylor case and denied a writ of error, the impression at least is created that the court had changed its ruling. Be this, however, as it may, if the Healing Act in question was intended to validate the purchase of the home section, and the right to purchase additional sections being dependent on a valid purchase of the home section, then the act which validated the purchase of the home section likewise validates the purchase of the additional sections.

The Court of Civil Appeals for the Fourth District in *Corrigan v. Fitzsimmons*, 95 S. W. 702 (C. A.), Associate Justice Fly delivering the opinion recognizes the conflict between the above two cases, for he says:

"The Supreme Court, in the case of *Spence v. Mitchell*, 96 T. 43 (70 S. W. 73), held in effect that the act of 1899, which validated the purchase of school lands which were settled upon and the legal payment made within six months from the date of application to purchase, had no reference to the purchase of additional sections, but afterwards refused a writ of error in a case decided by the Court of Civil Appeals of the Second District, in which exactly the opposite ruling was made. *Taylor v. Lewis*, 85 S. W. 1011. Whether the ruling in the last case was endorsed or not can not be ascertained, as there was probably another ground upon which the Supreme Court might have held that the result in that case was correct. It is regrettable that the Supreme Court did not indicate upon what ground the writ was refused, as it might thereby have removed any doubt as to its construction of the validating act of 1899."

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§ 217. *Sproule v. McFarland*, 56 S. W. 693.

The homestead may be subjected to a claim of attorney's fees stipulated in a contract for improvements, where the creditor is obliged to litigate his right to the lien.

OVERRULED BY: *American M. B. & L. Ass'n v. Harn*, 95 Tex. 79 (65 S. W. 176).

See Sec. 5, *American M. & B. Ass'n v. Harn*.

§ 218. *State of Texas v. Austin & N. W. R. R. Co.*, 94 T. 530 (62 S. W. 1050).

Under the General Laws of Texas authorizing the assessment of all property of railways for taxing purposes (Rev. Stat. 5062), the franchise of the railroad cannot be taxed separate from its other property.

CONTRA: *City of Dallas v. Dallas Consol. Elec. St. Ry.*, 95 T. 268 (66 S. W. 835).

The decision in the *Austin & N. W. R. Co.* case was based upon the general laws, and it was not held, nor intended to be held, that where the Legislature has made provision for this method of taxation, a franchise cannot be taxed separately from the property of a corporation, therefore held, that where the charter of the city of Dallas authorized such method of taxing, the franchise to use the streets owned by a street railway company may be assessed and taxed separately from its other property.

NOTE.

The *Austin & N. W. R. R.* case is cited in 88 A. S. 123 n; 53 L. R. A. 677n, and 63 L. R. A. 526n; while the *Dallas* case is cited in 66 L. R. A. 56 n.

In *S. W. Tel. & Tel. Co. v. Meerscheidt*, 65 S. W. 381, the Court of Civil Appeals follows the *Austin & N. W.* case without noticing the limitation of the *Dallas* case.

In *S. W. Tel. & Tel. Co. v. City of San Antonio*, 73 S. W. 859

(32 C. A. 101), the Court of Civil Appeals notices the distinction, but held that the franchise tax was bad owing to faulty description.

In *G. H. & S. A. Ry. Co. v. Davidson*, 93 S. W. 436, the *Austin & Northwestern* case was cited, but only with reference to the general state law.

In *State v. G. H. & S. A. Ry. Co.*, 97 S. W. 71, 100 T. 153, the Supreme Court again explains the *Austin & Northwestern* case and says that it did not hold that an occupation tax could not be levied upon a railroad.

In *Missouri, K. & T. Ry. Co. v. Shannon*, 97 S. W. 527 (C. A.), the Court cites both authorities for the proposition, that the Legislature if it sees fit may provide that the franchise may be taxed as part of the other property, or it may provide that it may be taxed separately. The General Laws had been changed and this case was upon the changed law, and when it reached the Supreme Court, 100 T. 379 (100 S. W. 138), the Court upheld the right of the state to separately tax the franchise of a railway company, as provided in the changed laws.

§ 219. *The State v. Brownson*, 94 T. 439 (61 S. W. 114).

The present Constitution, Art. 7, Sec. 3, et seq., was intended to give the Legislature a free hand in establishing independent school districts.

LIMITED: *Parks v. West*, 102 T. 11 (111 S. W. 726).

The decision in the *Brownson* case must be confined to the facts therein, and the question there discussed was whether or not the territory in an incorporated city or town could be included with other territory (in the same county) in an independent district formed for school purposes only, and the question was answered affirmatively. There was no question of combining parts of two different counties into one district, which cannot be done under the Constitution.

NOTE.

The *Parks* case is cited in *Brewer v. Hall*, 111 S. W. 788 (C. A.), and is followed by the Supreme Court in *Gillespie et al. v. Lightfoot*, 127 S. W. 799.

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§ 220. State v. Fielder, 30 S. W. 479 (10 C. A. 350).

An action by a father on a liquor dealer's bond for "five hundred dollars as liquidated damages," recoverable under Revised Statutes, Art. 3380, for a sale of liquor to the son, does not abate on the principal's death, though an action on the bond by the State for a penalty recoverable under the article does abate on such event.

OVERRULED: Johnson v. Rolls, 97 Tex. 453 (79 S. W. 513).

See Sec. 228, State v. Williams.

**§ 221. State v. Galveston, H. & S. A. Ry. Co, 97 S. W. 71,
100 T. 153.**

The tax on railroads imposed by the General Laws of 1905, p. 336, Chapter 141, imposing on railroad companies a tax "equal to" one per cent of their gross receipts, is an occupation tax, and is not a tax on the gross receipts of railroads, and is not an interference with Interstate Commerce in violation of Const. U. S., Art. 1, Sec. 8, Subdivision 3, the reference to gross receipts, being merely a means by which to ascertain the amount of the tax.

OVERRULED BY: Galveston H. & S. A. Ry. Co. v. The State, 210 U. S. 217 (28 S. C. 638).

The State cannot impose the tax levied by Texas Act of April 17, 1905, upon railway companies whose lines lie wholly within the State, "equal to 1 per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, or destined to, points without the State.

NOTE.

In the case of the State v. Texas & P. Ry. Co., 98 S. W. 834 (100 T. 279), the doctrine announced in 97 S. W. 71, was declared not applicable to the Texas & P. Ry. Co., or to any other railway similarly situated, that is, chartered directly by the United States

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Congress as a government agency. That in the latter class of railways their property might be taxed, but not their right to operate.

In *State v. M., K. & T. Ry. Co.*, 100 S. W. 146 (100 T. 420), this statute was again considered. the railway company taking the position that as the Court had held that the Texas and Pacific could not be so taxed therefore the statute did not apply equally to all railroads and hence as a whole was unconstitutional. The Court, however, declined to follow that view, again declaring that no part of the statute was unconstitutional, but that the Texas and Pacific or any other railway so situated was not subject to the tax. This case was decided February 27, 1907.

On May 18, 1908, the Supreme Court of the United States rendered its decision in the *G. H. & S. A. Ry. Co.* case overruling the Texas Supreme Court on this point and declaring such a tax an unlawful attempt to regulate commerce and hence void. The Court was divided upon the question, Mr. Justice Holmes writing the majority opinion holding the statute unconstitutional.

Mr. Justice Harlan, in a short but vigorous opinion dissents from the opinion of the majority and is joined in his dissent by Mr. Chief Justice Fuller, Mr. Justice White and Mr. Justice McKenna.

§ 222 *State v. M., K. & T. Ry. Co.*, 100 S. W. 146 (100 T. 420),

The tax on railroads imposing a tax "equal to one per cent of their gross receipts, etc." is constitutional. (See Laws of 1905, p. 336, Ch. 14.)

CONTRA: *Galveston H. & S. A. Ry. Co. v. State*, 210 U. S. 217.

NOTE.

See Sec. 221, *State v. G. H. & S. A. Ry. Co.*

§ 223. *State v. Moore*, 57 T. 397.

The county attorney has authority to prosecute a suit for the collection of taxes and penalties in the name of the State to the exclusion of the Attorney General.

CONTRA: *Brady v. Brooks*, 99 T. 366 (89 S. W. 1052).

Expressions to the effect stated above in *State v. Moore*, are

believed to be obiter dicta, but at all events will not be followed by the Supreme Court as the doctrine therein announced is believed to be already overruled in *Day L. & C. Co. v. State*, 68 T. 526.

NOTE.

The case of *Brady v. Brooks*, is so carefully and accurately written, that in a note it is impossible to condense the statements in a manner that would be helpful. The case itself should be studied.

§ 224. *State v. Williams*, 30 S. W. 477 (10 C. A. 346).

A suit against a liquor dealer and the sureties upon his bond for selling intoxicants to a minor, is not a prosecution under a criminal statute in its proper sense, but is a suit upon a contract for an amount due under the contract authorized and legalized by law.

OVERRULED: *Johnson v. Rolls*, 97 Tex. 453 (79 S. W. 513).

An action against a liquor dealer and the sureties on his bond to recover for selling intoxicants to plaintiff's minor son is not for the recovery of liquidated damages but for a penalty and the action dies with the liquor dealer.

NOTE.

The case of *Nolan v. Tennison*, 50 S. W. 1028 (21 C. A. 332), and the case of *State v. Fielder*, 30 S. W. 479, both by the Court of Appeals for the Third District are in accord with the overruled case, and both are overruled by the Supreme Court in *Johnson v. Rolls*.

The question raised by the conflict is of considerable importance, for if an action on a liquor dealer's bond is based upon a contract, then it does not abate on the death of the principal, and is only barred by the Statute of Limitation of four years. Whereas if the action is for the recovery of a penalty it does abate on the death of the principal and is barred in two years.

In the following cases the action is held to be penalty: Taking material from land of another; *M., K. & T. Ry. Co. v. Chenault*, 92 T. 504 (49 S. W. 1035); failing to furnish cars, *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 557 (45 S. W. 2, 43 L. R. A. 225 n);

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Insurance Co., failing to pay loss, *Northwestern Life Assn. v. Sturdivant*, 59 S. W. 61, 24 C. A. 333. For usurious interest paid, *Whitlow v. Culwell*, 40 S. W. 642 (16 C. A. 266); *Matthews v. I. B. & L. Assn.*, 50 S. W. 604; *Hemphill v. Watson*, 60 T. 679; *Rosetti v. Lozano*, 90 S. W. 204; Sheriff's failure to endorse execution, *Dewitt v. Dunn*, 15 T. 106; *Garza v. Booth*, 28 T. 478. Failure to deliver freight, *Schloss v. Ry. Co.*, 85 T. 601 (22 S. W. 1014). For fees illegally collected, *Lane v. Delta Co.*, 109 S. W. 866.

The following cases involve recoveries upon liquor dealers' bonds and some discuss at length the principle in conflict and all are in accord with overruling case. *Hillman v. Gallagher*, 120 S. W. 506; *State v. Schuenemann*, 46 S. W. 260 (18 C. A. 485); *State v. Vinson*, 23 S. W. 807 (5 C. A. 315); *Farenthold v. Tell*, 113 S. W. 639 (52 C. A. 110); *Ellis v. Brooks*, 102 S. W. 94; *Hawthorne v. State*, 87 S. W. 841 (39 C. A. 122); *White v. Manning*, 102 S. W. 1163 (46 C. A. 298); *Douthit v. State*, 82 S. W. 352 (36 C. A. 396); *Hillman v. Mayher*, 85 S. W. 818 (38 C. A. 377); *Castellano v. Marks*, 83 S. W. 729 (37 C. A. 273); *Long v. Green*, 95 S. W. 79; *Jessee v. De Shong*, 105 S. W. 1011.

§ 225. *Stevenson v. Roberts*, 64 S. W. 230 (25 C. A. 577).

When the will was probated, and the inventory and appraisal returned and approved, and the executrix had qualified, she became vested with the power of administration, and entitled to possession of the assets of the estate.

CONTRA: *Patten v. Cox*, 29 S. W. 182 (1 C. A. 263).

See Sec. 190, *Roberts v. Connellee*.

§ 226. *Sullivan v. Fant*, 110 S. W. 507 (51 C. A. 6).

A party who, after the admission of testimony over his objection, requires the witness on cross-examination to repeat the testimony with a view of defeating the force thereof by experimenting to see whether the witnesses will not impeach himself by giving his testimony differently, cannot claim that the testimony was in evidence over his objection.

CONTRA: *Cathey v. M., K. & T. Ry. Co.*, 133 S. W. 417 (T.).

It would indeed be a strange doctrine, and a rule utterly destructive of the right and all benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because by further inquiry he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event as would most usually occur that the witness should on cross-examination repeat or restate some or all of his evidence given on his direct examination.

NOTE.

In the case of *Sullivan v. Fant*, the Supreme Court refused a writ of error, therefore upon first blush it might be thought that in so doing it had adopted the ruling of the Court of Civil Appeals upon the matter and was therefore in conflict with itself in the ruling in the *Cathey* case. An examination of the *Sullivan* case, however, discloses that the Court of Civil Appeals, held, that the evidence in question was really admissible, but went further and said that even though same was inadmissible, then same could not be taken advantage of, etc. (as set forth in syllabus *supra*). It is therefore probable that when the Supreme Court refused a writ of error in the *Sullivan* case, that it considered the evidence admissible and the further remarks of the Court on the question as simply dicta. This must have been the view taken by the Supreme Court as all the better reasoning is for the law as stated in the *Cathey* case.

The following cases in addition to *Sullivan v. Fant*, are cited in the *Cathey* case to support the views as expressed in the *Sullivan* case, to-wit: *Eastham v. Hunter*, 98 T. 560 (86 S. W. 323); *Gammell-Statesman Pub. Co. v. Monfort*, 81 S. W. 1029; *Birkman v. Fahren-told*, 114 S. W. 428 (52 C. A. 335); *Texas & N. O. Ry. Co. v. Brown*, 114 S. W. 655; *Missouri, K. & T. Ry. Co. v. Pettet*, 117 S. W. 894; *Kingsley v. Schmicker*, 60 S. W. 331; *McDonald v. McCrabb*, 105 S. W. 238 (47 C. A. 259). The Supreme Court admits that some of these cases, especially the case of *M., K. & T. Ry. Co. v. Pettet* does support the view, but it distinguishes the case of *Eastham v. Hunter* (the only opinion by the Supreme Court). In any event, if these cases do support the view announced in *Sullivan v. Fant*, that view is expressly disapproved in the *Cathey* case, and all of the above cases must be considered overruled upon that point.

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§ 227. *Summerlin v. Reeves*, 29 T. 427.

It is not necessary in a petition for writ of error to state the names of the persons adversely interested, and if the names appear in the bond or other paper in the proceedings the clerk can look to such papers for the names of the persons to be cited, and when necessary the petition for the writ of error may be amended in the Supreme Court, and the names of persons omitted inserted.

CONTRA: *Weems v. Watson*, 91 T. 35 (40 S. W. 722).

See Sec. 98, *Hillebrant v. Brewer*.

§ 228. *Swearingen v. Williams*, 67 S. W. 1061 (28 C. A. 559).

A power of sale in a mortgage executed by a decedent cannot be exercised pending administration of his estate under an independent executor, even after the expiration of four years from his death.

OVERRULED: *Taylor v. Williams*, 101 T. 388 (108 S. W. 815).

The power given by a trust deed to sell land for debt, being coupled with an interest, is not revoked by death, but only suspended while its exercise would be inconsistent with the laws governing the administration of estates; and such suspension is not affected by administration under a will by an independent executor acting without control of the probate court in the presentation, allowance, classification and payment of claims against the estate.

NOTE.

The overruled case is by the Court of Civil Appeals for the Fourth District, while the overruling case is by the Supreme Court. The holding of Chief Justice James in the overruled case is based upon the idea that when a testator places his estate in the hands of the independent executor the Probate Court still has general jurisdiction over the estate, and power to take active control under certain contingencies and to permit a trustee in deed of trust to

sell the property of the estate under the power, would be in contravention of the powers given the Probate Court; for this holding he mainly relies upon the case of *Roy v. Whittaker*, 92 T. 346 (48 S. W. 892). This decision as explained by Judge Brown in the overruling case does not support his contention.

Black v. Rockmore, 50 T. 88, by the Supreme Court, was where the homestead was sold (before the Constitution of 1876), under a deed of trust after the death of the husband, while the wife was administering the estate as qualified community survivor. Held; that the sale was void and that as regards the power of sale after the death of the husband it can make no difference whether the estate is being administered by an administrator under the orders of the Probate Court or by a community survivor independently of its control. In either the power of sale is suspended. This is in accord with the overruled case and in conflict with the overruling case.

The case of *Williams v. Armistead*, 90 S. W. 925 (20 C. A. 105), by the Court of Civil Appeals for the Fifth District, application for writ of error to the Supreme Court dismissed for want of jurisdiction, seems to be in conflict with the overruling case in holding:

"A power of sale in a trust deed is revoked by the death of the holder of the equity of redemption in the land subject thereto, pending administration of his estate by an independent executor."

The following hold that after the death of the mortgagor the power of sale contained in a mortgage can be exercised after the lapse of four years, the statutory period for opening administration: *Rogers v. Watson*, 81 T. 400 (17 S. W. 29); *Silverman v. Landrum*, 47 S. W. 404 (19 C. A. 402); *Gillaspie v. Murry*, 66 S. W. 252 (27 C. A. 580).

In the following cases it is held that a sale under a power after the death of the mortgagor and pending administration upon his estate, is void: *Harris v. Wilson*, 40 S. W. 868 (C. A.); *Texas L. A. v. Dingee*, 75 S. W. 866 (33 C. A. 120); *Markham v. Wortham*, 67 S. W. 341 (C. A.); *Tiboldi v. Palms*, 78 S. W. 727 (34 C. A. 320); *Whitmore v. May*, 96 T. 317 (72 S. W. 375); *Buchanan v. Monroe*, 22 T. 537; *Robertson v. Paul*, 16 T. 472; *McLane v. Paschal*, 47 T. 370.

In the following it is held that the death of the mortgagor after he has parted with the title does not suspend the power of sale: *Mott v. Maris*, 29 S. W. 825 (C. A.); *Taylor v. Williams*, 101 T. 388 (108 S. W. 815); *Rogers v. Watson*, 81 T. 400 (17 S. W. 29); *Phillips v. Watson*, 90 T. 195 (38 S. W. 470); *Openshaw v. Dean*, 125 S. W. 989 (C. A.).

In *Kuck v. Dixon*, 127 S. W. 910 (C. A.), by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court, it is held, the fact that administration was opened and no further act was done in the administration of the estate, and the same was abandoned by the administrator, and no debts against the estate were in existence, the power of sale contained in the deed of trust still remains suspended.

In *Wierner v. Zweib*, 128 S. W. 699 (C. A.), by the same court, writ of error denied by the Supreme Court, it was held, that a sale made under the power is not void but is merely voidable, in case administration is subsequently begun within statutory time.

In *Linberg v. Finks*, 25 S. W. 789 (7 C. A. 391), by the Court of Civil Appeals for the Third District, by divided court, it is held, that a sale under a power in a vendor lien, contract, after the death of the vendee, is void, altho there had been no administration upon his estate. As a result of the conflicts the case of *Swearingen v. Williams* must be understood as expressly overruled and *Black v. Rockmore* and *Williams v. Almstead* are overruled by implication.

It being impossible to reconcile the conflicts between the cases above cited, it seems that the following principles may be considered established by the great weight of authority. In a deed of trust or mortgage giving power of sale, the power is suspended on the death of the mortgagor until four years for opening administration shall have elapsed. If on the death of the mortgagor, he leaves a will giving to his executor power to administer independent of the control of the Probate Court, or leaves a husband or wife surviving who qualifies as community survivor under the statute, then the power of sale contained in the mortgage which was suspended by his death revives, and can be executed altho the mortgagor's estate is being administered by independent executor or community survivor. When the mortgagor dies after he has sold the property upon which a mortgage with power of sale has been given, the power of sale is not thereby suspended but the power can be exercised so as to bar the vendee's equity of redemption, notwithstanding the death of the mortgagor. But if the vendee of the mortgagor dies, the right to exercise the power is thereby suspended and the sale can not be made until four years shall have elapsed for opening administration upon his estate. If, however, the vendee, upon his death, leaves an independent executor or a qualified community survivor, the power of sale which was suspended by his death, revives. If administration upon the estate of the mortgagor is opened before the mortgagor has parted with his title the power of sale contained in the mortgage becomes extinguished and the mortgagee must proceed through the Probate Court

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for the collection of his debt. If administration is opened upon the estate of the vendee of the mortgagor the power of sale likewise becomes extinguished and the mortgagee must proceed against his estate through the Probate Court.

For conflict on question of execution sale after death of the judgment defendants, see *King's Conflicting Cases*, Vol. 1, Secs. 19 and 86; Vol. 2, Sec. 457.

§ 229. *Taylor v. Lewis*, 85 S. W. 1011 (38 C. A. 390).

Sales of public lands are not void because made to a minor, especially where the minor evidences the affirmance of his purchase by continuing to occupy the land after reaching his majority.

CONTRA: *Walker v. Rogan*, 93 T. 248 (54 S. W. 1018).

See Sec. 261, *Watson v. White*.

§ 230. *Terry v. Dale*, 65 S. W. 51 (27 C. A. 1).

Under Act April 16, 1895, Sec. 8, authorizing a bona fide settler who was a head of a family, and who had purchased a section of agricultural land, to purchase three additional pastoral sections, on making the oath required by the statute, a settler on a section classed as dry grazing lands and not as agricultural lands is not entitled to purchase under the statute.

CONTRA: *Trevey v. Lowrie*, 78 S. W. 18 (33 C. A. 606).

Under the Act of 1895 the right to purchase additional sections is not restricted to purchasers of agricultural sections, but the purchaser of a section classified as grazing land is entitled to purchase additional land.

NOTE.

The first case is by the Court of Civil Appeals for the Third District, writ of error was denied by the Supreme Court. The second case is by the Court of Civil Appeals for the Second District

but does not appear to have ever reached the Supreme Court. This was again tried, 89 S. W. 981 (40 C. A. 321), in which a writ of error was denied by the Supreme Court, but the question in conflict does not appear to have been involved.

The Act in question reads as follows:

"Any bona fide settler who has heretofore purchased, or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections, upon his making oath that he is not actually in conclusion with others for the purpose of buying for any other person or corporation, or that no other person or corporation is directly or indirectly interested in the purchase of the same."

The above was amended by the Act of 1897, p. 184, so as to read as follows:

"Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchase shall not exceed four sections, and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no one other person or corporation is interested in the purchase thereof."

The act of 1895 contains many other provisions in addition to the section above quoted which are, however, too lengthy to be given in full, indicating that it was the intention of the law makers to sell grazing or agricultural land to one complying with the law and becoming an actual settler thereon, and the same when so purchased as the home section, regardless of the classification when sold, would become the basis for the purchase of additional land. This appears to be the ground on which the Trevey case was decided and altho contrary to the rule announced in the Terry case, is believed to be the better authority.

§ 231. Texas C. Ry. Co. v. O'Laughlin, 72 S. W. 610 (C. A.).

A carrier, though prohibited from limiting its liability, is not deprived of a right to make a special contract with the owner of live stock tendered for transportation, requiring such owner to see that the stock is properly loaded, and where the owner of the stock who has made such a contract with the

company is at fault in overloading the car, or in not having sufficient bedding, etc., the railway company is not liable for resulting injuries.

CONTRA: Trout & Newberry v. Gulf Co. & S. F. Ry. Co., 111 S. W. 220 (— C. A. —).

A carrier is liable for injuries resulting under the circumstances detailed above, and to hold otherwise would be to allow a carrier to limit its liability for negligence by contract, which it cannot do. The shipper under such circumstances might be liable on his contract for his negligence in performing the duties assumed, but this would not relieve the railway of its liability for its neglect of duty as a common carrier.

NOTE.

The first case was decided by the Court of Appeals for the Second District but has never been passed upon by the Supreme Court although it has been followed and approved by the same court in the case of Texas & P. Ry. Co. v. Edins, 83 S. W. 253 (36 C. A. 639). Neither has the Trout case by the Court of Appeals for the Sixth District ever been reviewed by the Supreme Court but is directly in conflict with the first case mentioned.

In Texas & P. Ry. Co. v. Stribling, 34 S. W. 1002; International Ry. Co. v. Parish, 43 S. W. 1066 (18 C. A. 130); it is held that a contract by which the shipper is to load and unload the cattle is valid, yet it is held in the case of Galveston H. & S. A. Ry. Co. v. Trawick, 80 Tex. 270 (15 S. W. 568; 18 S. W. 948); that liability for safety of cattle shipped upon a railway begins when they are received for shipment in its stock pens prepared by it in aid of the shipment. The Trawick case is followed by Gulf C. & S. F. Ry. Co. v. Trawick, 68 Tex. 314 (4 S. W. 567, 2 Am. St. 494); and Gulf C. & S. F. Ry. Co. v. Wood, 30 S. W. 715.

If this be correct, then the liability of the railway company has begun and it became its duty to see that the cattle were properly loaded, hence it follows that a contract by the shipper by which he was to see to the proper loading of the cattle was a limitation upon his liability as a carrier at common law.

In I. & G. N. Ry. Co. v. Drought & Co., 100 S. W. 1011, the Court of Civil Appeals for the Fourth District, held, that where a shipper assumes the duty of loading cars for shipment, the carrier is not liable for damages arising from the improper loading of the goods,

and the knowledge on the part of the conductor that the goods were improperly loaded would not relieve the shopper of the effects of his contributory negligence.

In *T. & N. O. Ry. v. Davis Fowler Co.*, 133 S. W. 309, by the Court of Civil Appeals for the Fourth District, the principle announced in the *O'Laughlin* and *Drought* cases is apparently recognized, but it is held in the case that the principle had no application because after the cars were loaded by the shipper, the railway disregarded his instructions.

In *Atchison, T. & S. F. Ry. Co. v. Bivins*, 136 S. W. 1180 (C. A.), the principle announced in the *O'Laughlin* case likewise seems to be recognized, but the court held that it had no application because the cars were completely loaded before the contract was signed, and was done by the servants of the railway company.

It would therefore appear that the *O'Laughlin* case is supported by the greater weight of authority, although the *Trout* case is supported by the better reason. The carrier cannot do a thing indirectly which the law prohibits it from doing directly. In other words, if the law imposes upon the carrier the duty to load goods after they have been received, then it is liable for the damages arising from improper loading, and it cannot escape liability by contracting with the shipper that he should see to the proper loading. To permit the carrier to escape liability by this indirect method would be equivalent to authorizing it to enter into a contract directly with the shipper by which the carrier shall be exempt from all liability due to its own negligence.

§ 232. *Texas & N. O. Railway Co. v. Conroy*, 83 T. 214
(18 S W. 609).

Where in a charge to the jury a number of separate acts of negligence are mentioned, and the non-existence of either of them would render the defendant not liable, it is reversible error for the court to give the charge conjunctively, as each should be presented by the court to the jury as a separate defense.

CONTRA: *Gulf, C. & S. F. Ry. Co. v. Hill*, 95 T. 629 (69 S. W. 136).

Where the jury is charged that if they believe in the existence or non-existence of a number of facts, stated conjunc-

tively, they should find a verdict for the defendant, and where the existence or non-existence of any one of the facts would under the law render the defendant not liable, and therefore the charge requires a higher degree of care on the part of the defendant than the law would require, still in the absence of a request on the part of the defendant that the defenses be given in charge disjunctively, it is not reversible error to give such conjunctive charge, unless the charge positively informs the jury that all of such acts or conditions must be believed to exist or that nothing less than the proof of all would discharge defendant, or the absence of any reason to believe that the jury was misled by the conjunctive charge.

NOTE.

The charge in the Conroy case was as follows:

"If the goose-neck coupling apparatus was not more dangerous than an ordinary coupler *and* if plaintiff knew of its being there, and did not use ordinary care, as a man of ordinary care and skill reasonably should have used considering the circumstances and danger attending the making of such coupling," then the verdict should be for the defendant.

The court held that the existence of either one of the facts referred to in the charge connected by "and" would be sufficient to exempt defendant of liability, and each of them should have been given as a separate defense.

It will be observed that the Hill case is very careful to limit its decision. It does not say that such conjunctive charge is never reversible error, but clearly indicates that it would be reversible error if either of the following facts had existed.

1st: If the defendant has asked for proper disjunctive charges.

2nd: If the charge informs the jury that nothing less than proof of all the facts would discharge the defendant and

3rd: If the record presents any reason to believe that the jury was misled by the conjunctive charge.

The Conroy case cites the following cases in support of the doctrine it announces, to-wit: *Missouri Pac. Ry. Co. v. Somers*, 78 T. 439 (14 S. W. 779); *G. H. & S. A. Ry. Co. v. Garrett*, 73 T. 262 (13 S. W. 62); *G. C. & S. F. Ry. Co. v. Brentford*, 79 T. 619 (15 S. W. 561), (23 A. S. R. 377); *Railway Co. v. Lempe*, 59 T. 19; *Railway Co. v. White*, 76 T. 102 (13 S. W. 65, 18 A. S. R. 33). An examination of these cases discloses that in none of them was assignment of error

made upon the direct point of the conjunctive charge, but are all upon assumption of risk. It is really doubtful in most of the cases whether the charge given is really conjunctive.

The case of *Liverpool & L. & G. Ins. Co. v. Joy*, 62 S. W. 546, 64 S. W. 786 (26 C. A. 613), cites with approval the *Conroy* case, but it will be observed that the charge in that case substantially was that the defendant must establish all of his defenses, thus bringing the case in harmony with proviso number two of the *Hill* case (*supra*).

In *Kershner v. Latimer*, 64 S. W. 237, the same doctrine is announced as in the *Conroy* case, although it does not cite the *Conroy* case.

In *Merchants & Planters Oil Co. v. Burow*, 69 S. W. 435, upon first hearing the *Conroy* case was followed, but pending rehearing the *Hill* case was decided, and on rehearing the court following the *Hill* case refused to reverse, because of a conjunctive charge, because the defendant had not asked a special charge giving its defenses separately.

In *Chicago R. I. & G. Ry. Co. v. Johnson*, 101 T. 422 (108 S. W. 964), a case certified to the Supreme Court by the Court of Civil Appeals for the Second Supreme Judicial District, Justice Stephens in certifying the case mentions the case of *Kerschner v. Latimer* (*supra*), seemingly with approval, evidently not having his attentions called to the *Hill* case, which certainly limits if it does not overrule the *Latimer* case. Justice Williams writing the opinion of the Supreme Court in answer to the certified questions declares that in order for a conjunctive charge to be reversible error, *correct* special instructions should have been asked.

Railway Company v. Hill has been followed on this point by many cases, to wit: *Merchants & Planters Oil Co. v. Burow*, 69 S. W. 435; *G. H. & S. A. Ry. Co. v. Hubbard*, 76 S. W. 764 (33 C. A. 343), writ of error refused; *Crow v. Citizens Ry. Co.*, 78 S. W. 15 (34 C. A. 8); *Williams v. G. H. & S. A. Ry. Co.*, 78 S. W. 45 (34 C. A. 145), writ of error refused; *Jones v. Wright*, 81 S. W. 570 (98 T. 457, 84 S. W. 1053); *Vicars v. G. C. & S. F. Ry. Co.*, 84 S. W. 286 (37 C. A. 500); *I. & G. N. Ry. Co. v. Vanlandingham*, 85 S. W. 847 (38 C. A. 206), writ of error denied; *Crowder v. St. L. S. W. Ry. Co.*, 87 S. W. 166 (39 C. A. 314); *McDonald v. Nalle*, 91 S. W. 632 (41 C. A. 499); *G. H. & S. A. Ry. Co. v. Mohrmann*, 93 S. W. 1090 (42 C. A. 374), writ of error refused.

DeCastillo v. G. H. & S. A. Ry. Co., 95 S. W. 547 (42 C. A. 108), writ of error refused; *Cane Hill Cold Storage Co. v. S. A. & A. P. Ry. Co.*, 95 S. W. 751 (C. A.); *St. L. Southwestern Ry. Co. v. Pope*, 97 S. W. 534 (43 C. A. 616), writ of error denied; *G. H. & S. A. Ry. Co. v. Garrett*, 98 S. W. 932 (44 C. A. 406), writ of error refused;

M. K. & T. Ry. Co. v. Mason, 99 S. W. 186 (44 C. A. 627); T. C. Ry. Co. v. Waldie, 101 S. W. 417 (C. A.); Salman v. G. C. & S. F. Ry. Co., 101 S. W. 1030 (C. A.); T. & P. Ry. Co. v. Patterson, 102 S. W. 138 (46 C. A. 292); T. & N. O. Ry. Co. v. Davidson, 107 S. W. 494 (49 C. A. 409), writ of error denied; El Paso Electric Ry. Co. v. Ruckman, 107 S. W. 1158 (49 C. A. 25), writ of error denied; G. H. & S. A. Ry. Co. v. Herring, 113 S. W. 521, 102 T. 100; Hess v. Webb, 113 S. W. 618 (C. A.); L. & T. Lumber Co. v. Dupuy, 113 S. W. 974 (52 C. A. 46), application for writ of error dismissed; H. & T. C. Ry. Co. v. Haberlin, 107 S. W. 107 (C. A.), which case was certified to the Supreme Court and appears in 133 S. W. 873, T. —.

In *Houston & T. C. Ry. Co. v. Helm*, 93 S. W. 697 (C. A.), the *Hill* case is cited with approval, but in that case it was held that not only was the charge conjunctive, but was positively erroneous, and hence the doctrine of the *Hill* case did not apply.

The case of *Ry. Co. v. Brown*, 78 T. 402 (14 S. W. 1034), and *Ry. Co. v. Word*, 69 T. 679 (7 S. W. 372), are in line with the *Hill* case.

It will thus be seen that *T. & N. O. Ry. Co. v. Conroy*, 83 T. 214 (18 S. W. 609), and *Kershner v. Latimer*, 64 S. W. 237 (C. A.), are practically overruled. See *Citizens Ry. Co. v. Branham*, 137 S. W. 403 (C. A.), a case which also follows the *Hill* case.

**§ 233. Texas & N. O. Ry. Co. v. Walker, 95 S. W. 743
(43 C. A. 278).**

While it is the province of the jury to pass upon matters of fact still a witness having the proper knowledge may be asked questions, such as, "what is the reasonable time for the transportation of live stock from one place to another?" for the purpose of guiding and aiding the jury in reaching its verdict.

CONTRA (Overruled): *Houston & T. C. Ry. Co. v. Roberts*, 108 S. W. 808 (101 T. 418).

NOTE.

See for full discussion Sec. 241, *T. & P. Ry. Co. v. Ellerd*.

§§ 234, 235] CONFLICTING CASES.

§234. **Texas-Mexican Ry. Co. v. Douglas**, 69 T. 694 (7 S. W. 77).

Unless the capacity of a party to earn money was entirely destroyed by injuries, mortuary tables are not admissible to establish the probable duration of the injured party's life.

CONTRA: **Gulf, C. & S. F. Ry. Co. v. Mangham**, 95 T. 413 (67 S. W. 765).

Standard mortuary tables are admissible to show the probable duration of the plaintiff's life, when the injuries are permanent but only a partial disability to work exists from said injuries, and is not limited to cases where the incapacity is total.

NOTE.

For previous discussion of this point see **King's Conflicting Cases**, Vol. 2, Sec. 153-412 and 462.

The **Douglas** case is positively overruled and the following cases follow the **Mangham** decision: **M. K. & T. Ry. Co. v. Scarborough**, 68 S. W. 196 (29 C. A. 194), writ of error refused; **G. C. & S. F. Ry. Co. v. Mangham**, 69 S. W. 80 (29 C. A. 486), writ of error denied; **S. A. & A. P. Ry. Co. v. Moore**, 72 S. W. 226 (31 C. A. 371), writ of error denied; **T. & N. O. Ry. Co. v. Kelly**, 80 S. W. 1073 (34 C. A. 21), writ of error denied; **I. & G. N. Ry. Co. v. Tisdale**, 81 S. W. 347 (36 C. A. 174); **I. & G. N. Ry. Co. v. Branden**, 84 S. W. 272 (37 C. A. 371).

§ 235. **Texas & Pacific Coal Co. v. Lawson**, 34 S. W. 919, 32 S. W. 871 (89 T. 394).

Under the Anti-trust Act of 1889, page 141, C. 117, prohibiting monopolies and pronouncing them void, a lease made by a coal company of its saloon, with agreement not to permit the sale of liquor by any other person upon its lands at that place, and also to pay its employees in checks and to redeem any checks taken by the lessee in payment for liquor is void.

CONTRA: **Redland Fruit Company v. Sargent**, 113 S. W. 330 (51 C. A. 619).

Under the Anti-trust Act of 1889, p. 141, C. 117, only those

contracts in restraint of trade are forbidden, where the party would otherwise by law have a right to pursue such trade or calling, etc. A party has no right at law to pursue a particular trade or calling upon the lands or property of another, without that other's consent, therefore a contract between the owners of a plantation and another, that such other shall have the exclusive right to sell goods upon said plantation, and that the company will use its influence to compel its employees to trade with such merchant is not within the meaning of the statute, and is therefore not void but is valid and a suit for damages for its breach would lie.

NOTE.

The contract in the Lawson case was in some respects more stringent than in the Sargent case, and this fact is noted by Judge Hodges in his opinion in the Sargent case in an effort to distinguish the two cases. It is true that in the Lawson case the Coal company bound itself not to engage in a business in competition with the lessee, but the company in the Sargent case bound itself to endeavor to give to Sargent their trade from the plantation and to give no other rights on the premises to other parties for the sale of merchandise. It is hard therefore to see the difference in meaning between the provision in the two contracts. Judge Hodges thereupon after attempting to do so, says that if his court has departed from the language used in the Lawson case, he thinks that it is justified both by reason and by later decisions of the Supreme Court. He cites the following, viz: *Ft. Worth & D. C. Ry. Co. v. State*, 87 S. W. 336 (99 T. 34), and *Lewis v. Ry. Co.*, 81 S. W. 111 (36 C. A. 48). The Lewis case was where the railway company had granted an exclusive privilege to go upon its train and solicit baggage and transfer customers. Lewis was engaged in a transfer business and would buy a ticket and get upon the company's trains and solicit baggage and transfer customers in opposition to the company's license. The company sought to enjoin him from so acting and their contract was attacked as illegal and void. The Court of Civil Appeals, Justice Speer, writing the opinion, held, that such a contract was not in violation of the anti-trust law, and that while Lewis had a right to pursue his business he had no right "to enter upon the company's property for that purpose without its permission." The Supreme Court refused a writ of error, and in the subsequent case of *Ft. Worth & D. C. Ry. Co. v. State*, 87 S. W. 336, mentioned above, cited same with approval. In that case the Railway Company made an exclusive

contract with the Pullman Car Company to furnish and run Pullman cars upon its trains and railroad. The Court held, that it had a right to make such a contract and that same was not in contravention of the anti-trust statute, that other companies had a right to operate sleeping cars, but not upon the property of the railroad without its consent. Much of the reasoning, however, in the Lawson case has been followed by other cases, viz: Texas Brewing Company v. Pempleman, 38 S. W. 26 (90 T. 277); Fuqua v. Pabst Brewing Co., 38 S. W. 29 (90 T. 298); Gates v. Hooper, 39 S. W. 186 (C. A.), reversed by Gates v. Hooper, 39 S. W. 1076 (90 T. 563); White Dental Mfg. v. Hertzberg, 51 S. W. 355 (C. A.); Pasteur Vaccine Limited, v. Burkley, 54 S. W. 804 (22 C. A. 232); Troy Buggy Co. v. Fife, 74 S. W. 956 (C. A.).

An examination of all of these cases, will show, however, that they do not involve a contract where one party to same grants exclusive rights to another to do certain things or to conduct certain business upon his own private property, but all involve contract giving one party the right to exclusively sell certain goods in a particular public locality (such as a city, or county), and where such party bound himself to sell no other goods of a like character. It will therefore be seen that the Lawson case is in effect modified, and that the doctrines therein announced do not apply when the exclusive contract concerns a business to be conducted upon the property of the grantor, because no one has the material right to pursue any business or calling upon the private property of another without that other's consent; and the law does not undertake to give him that right.

Attention is called to a recent decision announcing that where the article about which the contract is made is a matter of Interstate Commerce, that the Anti-trust Law does not apply. See Maroney Hardware Co. v. Goodwin Pottery Co., 120 S. W. 1091 (C. A.); also Albertype Co. v. Gust-Flest Co., 114 S. W. 791 (102 T. 219).

N. B. Since writing the above the case of Wheatley v. Kollaer, 133 S. W. 903 (C. A.), has been decided and follows the doctrine of the Redland Fruit Co. case, but in State v. Racine Sattley Co., 134 S. W. 400 (C. A.), the court seems inclined to follow the Lawson case.

§ 236. Texas & P. Coal Co. v. McWain, 124 S. W. 202 (C. A.).

If a company contracts with an employee that in consideration of a monthly deduction from his wages, that in case he becomes ill or is injured it will furnish him medical and hos-

pital attention, then such company is liable for the negligence of its physicians supplied by it in discharge of such undertaking, notwithstanding it may be that no profit accrues to it from the deductions thus imposed upon its employees. Indeed the liability would be the same if no deduction whatever was made. It is inherent in the very contract of employment, and to furnish careful treatment where it has contracted to do so is as much a part of its duty as to exercise care in furnishing a safe place to work and safe tools and appliances with which to labor.

CONTRA: *Texas Central Ry. Co. v. Zumwalt*, 132 S. W. 113 (T.).

Though a company contract with an employee that in consideration of a monthly deduction from his wages, that in case he becomes ill or is injured, it will furnish him medical and hospital attention, such company is not liable for the negligence of the doctor employed or malpractice on his part, unless it be shown that the company originated the scheme with a view of promoting its own business, and undertook the dispensing of the fund to accomplish a purpose of its own or that it used the fund, by means of the contract with the doctor to its own advantage. Because unless it be shown that the company had some purpose to be served in connection with its own business by administering the fund, the fund constituted a charity of which the company was trustee, and it would only be required to use ordinary care in the selection of the physician as the means by which to carry out the scheme inaugurated.

NOTE.

As the Supreme Court denied a writ of error in the *McWain* case it becomes necessary to examine the history of several rulings.

The Fourth Court of Civil Appeals in *G. H. & S. A. Ry. Co. v. Hanway*, 57 S. W. 697 (C. A.), and *G. H. & S. A. Ry. Co. v. Scott*, 44 S. W. 589 (18 C. A. 321), had held substantially as the Supreme Court subsequently held in the *Zumwalt* case.

The Court of Civil Appeals for the Second District, Chief Justice Connor writing the majority opinion, in *Zumwalt v. Texas Central*

Ry. Co., 121 S. W. 113, took the opposite view, such as it subsequently expressed in the McWain case above. In so doing it noticed the seeming conflict between its views and the views as expressed by the Fourth Court of Civil Appeals, but distinguished the Scott case, by showing that in that case the company might have been liable for the failure to exercise ordinary care in selecting the physician. It, however, had to admit that the Hanway case conflicted with its view, but declined to follow same. Justice Dunklin dissented from the views of the majority of the Court in part, and while it is not clear just how far he dissents, still his views appear to be closer to the Supreme Court than his brother judges. (For his opinion, see *Zumwalt v. Texas, C. Ry. Co.*, 132 S. W. 112). Now with matters in this condition, that is the Second Court of Civil Appeals recognizing that its opinion was in conflict with the opinion of the Fourth Court of Civil Appeals, probably before the Supreme Court had granted a writ of error in the Zumwalt case, the Second Court of Civil Appeals decided the McWain case in which it followed its holding in the Zumwalt case, and on January 19, 1910, the Supreme Court denied a writ of error. Why they did this, we are unable to say, unless the attorneys in the case failed to present to them the question of conflict. At all events the Zumwalt case having in the meantime reached the Supreme Court (that court having granted a writ of error on the ground of conflict with the Hanway case), on November 30, 1910, handed down its opinion as stated in the syllabus; thus in substance following the Hanway case and disapproving the Second Court of Civil Appeals opinion in the Zumwalt case, and incidentally (although the case is not mentioned), overruling the McWain case.

It will be observed that all the Courts indicate one way in which a company may be liable under contracts of this character, that is, if they fail to exercise ordinary care in selecting a competent physician, then it would be liable for the physician's negligence or malpractice.

§ 237. *Texas & Pacific Railway Co. v. Bowlin*, 32 S. W. 918
(— C. A. —).

While it is doubtless true that to warrant the recovery of a particular sum for lessened capacity to earn money in a particular avocation, there should be other evidence than merely proof of the avocation of plaintiff and the character of his injuries, still where the injuries supposed are shown to be of such a nature as to fairly justify the conclusion that plain-

tiff's capacity to earn money in any avocation has been diminished, then it should be held that the recovery of some amount as damages for such diminished capacity has been sufficiently established. That is, the plaintiff would be entitled to nominal damages, and in the absence of an assignment of error that the verdict is excessive the amount recovered will be presumed to be nominal.

CONTRA: *Houston & T. C. Ry. Co. v. Bird*, 48 S. W. 756 (C. A.).

A lessened capacity to earn money is recognized by law as a basis sufficient for the recovery of damages by reason of personal injuries, but it is not sufficient merely to show the avocation of the plaintiff and the character of the injuries. And while it is not necessary to establish with exactness the value of the services, or the extent to which the earning capacity has been affected, still the resulting verdict must not be the result of a mere guess, and sufficient facts must be proved by the plaintiff to enable the jury to determine intelligently the amount that will fairly compensate plaintiff for the loss sustained.

NOTE.

The doctrine announced in the *Bird* case was followed in *Railway Co. v. Smith*, 86 S. W. 946 (38 C. A. 507), and in *Railway Co. v. Acker*, 99 S. W. 131 (44 C. A. 560). In *Railway Co. v. Motwiller*, 112 S. W. 795 (51 C. A. 432), the Court of Civil Appeals certified the question to the Supreme Court, by reason of this conflict. It will be observed, however, that in passing upon the question as certified, the Supreme Court [see *Railway Co. v. Motwiller*, 109 S. W. 921 (101 T. 515)], states that it is not clear that there is a conflict between the decisions and intimates that the opinions might be proper as applied to the particular facts of each case. It may be stated with confidence, however, that it announced the true doctrine to be as set forth under the *Bowl* case, *supra*, and the cases may be considered reconciled upon the basis of the *Motwiller* case (109 S. W. 921). In the subsequent case of *Ry. Co. v. Niblack* (117 S. W. 188) (C. A.), the matter was again reviewed and the Court decides to follow the *Bowl* case. The Supreme Court refused a writ of error in the *Niblack* case.

§§ 238, 239] CONFLICTING CASES.

§ 238. **Texas & Pacific Ry. Co. v. Bowlin, 32 S. W. 918 (C. A.).**

Where in a suit for damages for personal injuries occasioned by the loss of an eye the capacity to earn a livelihood is obviously diminished and further proof of damage is not necessary.

CONTRA: St. Louis S. W. Ry. Co. v. Smith, 86 S. W. 943 (38 C. A. 507).

In an action for the loss of an eye and for damage for diminished capacity to earn money, it is not sufficient to prove the occupation and earning capacity of the plaintiff, but other facts must be proven in order to furnish the basis for recovery.

NOTE.

See note for full discussion, Sec. 237, T. & P. Ry. Co. v. Bowlin.

§ 239. **Texas & P. Railway Co. v. Bowlin, 32 S. W. 918 (C. A.).**

Where in a suit for damages for personal injuries occasioned by the loss of an eye, the capacity to earn a livelihood is obviously diminished and further proof of damages it not necessary.

CONTRA: St. Louis, S. W. Railway Co. v. Acker, 99 S. W. 121 (44 C. A. 560).

In an action to recover for injuries received while working in a car at the request of the conductor of a train, plaintiff testified that he was a tomato grower, and before receiving the injuries was an active man. Held, that the evidence was not sufficient basis for an instruction that, if the jury find for the plaintiff, the measure of his damages would be such sum as would be a reasonable compensation for his loss or injury from inability, or diminished ability to labor and earn money.

NOTE.

See note for full discussion, Sec. 237, Texas & P. Ry. Co. v. Bowlin.

CONFLICTING CASES. [§§ 240, 241

§ 240. Texas & P. Ry. Co. v. Edins, 83 S. W. 253 (36 C. A. 639).

A carrier, though prohibited from limiting its liability, is not deprived of the right to make a special contract with the owner of live stock tendered for transportation, requiring such owner to see that the stock is properly loaded, and where the owner of live stock was at fault in loading too many animals into a car, he could not recover from the carrier for injuries occasioned by the reason of such over crowding.

CONTRA: Trout v. G. C. & S. F. Ry. Co., 111 S. W. 220 (C. A.).

See Sec. 231, Tex. C. Ry. Co. v. O'Laughlin.

§ 241. Texas & P. Ry. Co. v. Ellerd, 87 S. W. 362 (39 C. A. 596).

While it is the province of the jury to pass upon matters of fact, still a witness having the proper knowledge may be asked questions, such as "what is the reasonable time for the transportation of live stock from one place to another?" for the purpose of guiding and aiding the jury in reaching its verdict.

CONTRA: (Overruled) Houston & T. C. Ry. Co. v. Roberts, 108 S. W. 808 (101 T. 418).

It is an invasion of the province of the jury to allow a witness in answer to questions to give his conclusion upon mixed questions of law and fact, and such questions as "what is the reasonable time for the transportation of stock between any two particular points?" or what is the reasonable time for the transportation of stock between any two particular points, provided they are transported with ordinary care and diligence?" are mixed questions of law and fact and should not be allowed to be asked.

NOTE.

The opinion in the Roberts case was given in answer to certified questions setting forth the conflict. Very many cases are cited in the

Roberts case both *pro* and *con*, but as in almost each case the questions differed in some particular, it is impractical in a work of this character to set forth the precise question asked.

The court also expressly disapproved of *T. & N. O. Ry. Co. v. Walker*, 95 S. W. 743 (43 C. A. 278), which therefore may likewise be considered overruled. The Roberts case, which should be carefully examined, has been followed by many other decisions, and the doctrine seems now to be firmly established that no mixed questions of law and fact may be asked a witness. See *St. Louis & S. F. Ry. Co. v. Wilhelm*, 108 S. W. 1195 (49 C. A. 639); *G. C. & S. F. Ry. Co. v. Kimble*, 109 S. W. 235 (49 C. A. 622); *H. & T. C. Ry. Co. v. Roberts*, 109 S. W. 982 (50 C. A. 69); *G. H. & S. A. Ry. Co. v. Noelke*, 110 S. W. 82 (C. A.); *Bryan Press Co. v. H. & T. C. Ry. Co.*, 110 S. W. 99 (C. A.); *G. C. & S. F. Ry. Co. v. Rogers*, 113 S. W. 584; *Williams v. Livingston*, 113 S. W. 787 (52 C. A. 275); *G. H. S. A. Ry. Co. v. Henefy*, 115 S. W. 60 (C. A.); *St. Louis & S. F. Ry. Co. v. May*, 115 S. W. 901 (C. A.); *T. & P. Ry. Co. v. Henson*, 121 S. W. 1129 (C. A.); *Koppe v. Koppe*, 122 S. W. 74 (C. A.); *M. K. & T. Ry. Co. v. Scroggins*, 123 S. W. 230 (C. A.); *G. H. & S. A. Ry. Co. v. Jones*, 123 S. W. 744 (C. A.); *T. P. Ry. Co. v. Jones*, 124 S. W. 196 (C. A.); *M. K. & T. Ry. Co. v. Gober*, 125 S. W. 385 (C. A.).

§ 242. *Texas & Pacific Railway Co. v. Huber*, 100 T. 1
(92 S. W. 832).

An action brought in the state court against a corporation created by an Act of Congress, and against one of its employees, to recover damages for personal injuries, occasioned by the negligence of both, is, as to the corporation, a suit arising under the Federal Constitution and laws, within the meaning of the removal provisions of the Act of Congress, but not as to the individual, and as the controversy is not separable the right of removal does not exist.

OVERRULED BY: *In re Mary Dunn*, 212 U. S. 374.

An action brought against a corporation created by an act of Congress, and against two of its employees, to establish a joint liability for negligence, is, as to the individual defendant, as well as to the corporation, a suit arising under the Federal Constitution or laws, within the meaning of the removal statute.

NOTE.

The defendant corporation in both of the above cases was the Texas & Pacific Railway Company, created by special act of Congress. The co-defendant in the overruled case was the engineer in charge of the train at the time of plaintiff's injuries, and was a citizen of Texas. The co-defendants in the overruling case were the engineer and fireman in charge of the train at the time of plaintiff's injuries, and both were citizens of Texas. The overruled case was decided by the Supreme Court of Texas on a certified question from the fourth district, and in answering the question the Supreme Court denied the right of removal. The overruling case was decided by the Supreme Court of the United States, on an application for a rule to show cause why mandamus should not issue to the district judge of the United States Court for the northern district of Texas, commanding him and the circuit court for that district, to remand the cause to the district court of Dallas in which the suit was originally brought.

Associate Justice Peckham in awarding the mandamus holds that the statute organizing the Texas & Pacific Railway Company, involved a Federal law, and, as it was a joint cause of action, it was clear that the whole case arose under the Federal law; that while a suit against the engineer and fireman, citizens of the State, could have been maintained without reference to the Federal law, yet, as it was sought to hold the Texas & Pacific Railway Company jointly with the engineer and fireman, citizens of Texas, then a new character was given to the action and a new element was introduced, to-wit, the laws of the United States, therefore, as it was necessary, in order to maintain the action against the defendants jointly, to invoke the Federal law, the case was one arising under the laws of the United States and hence the whole case was removal under the statute.

In reference to the Texas cases he uses the following language:

"We are aware that a different view has been taken of the rights of defendant situated like those in this case by the Supreme Court of Texas, in *Texas & P. R. R. Co. v. Huber*, 100 T. 1, 92 S. W. 832; *Eastin v. Texas & P. R. R. Co.*, 99 T. 654, 92 S. W. 838; but, as this is a case where we are called upon to exercise our own judgment, we have come to a different conclusion notwithstanding our great respect for the decisions of the courts of that State."

In that opinion the following cases are cited: *Osborn v. Bank*, 9 Wheat. 738; *Pacific R. Removal Cases*, 115 U. S. 1; *Madison Tea Co. v. St. Bernard M. Co.*, 196 U. S. 239; *Cockrum v. Montgomery Co.*, 199 U. S. 260; *Alabama v. Thompson*, 200 U. S. 206.

The case of *Texas & P. Ry. Co. v. Tucker*, 106 S. W. 764 (48 C. A. 115), decided by the Court of Civil Appeals for the first district is in accord with the overruled cases and must be considered itself overruled.

In the case of *Texas & P. Ry. Co. v. Beckworth*, 118 S. W. 729, as Associate Justice Talbot of the Court of Appeals for the fifth district holds with the Supreme Court of the United States, and uses the following language:

"The Supreme Court of this State in the case of *Eastin v. Texas & P. Ry. Co.*, and *Texas & P. Ry. Co. v. Huber*, decided prior to the *Dunn* case, seems to have reached a different conclusion upon the question; but as the Supreme Court of the United States is the court of last resort in cases of this character, we presume the Supreme Court of Texas will follow its decision."

§ 243. *Texas & P. Ry. Co. v. Hunt*, 85 S. W. 1168 (38 C. A. 460).

Suit was brought in Justice Court to recover \$189.46 damages to shipment of goods, with interest from November 13th, 1903, which brought the amount within Two Hundred Dollars, and on appeal to the county court an amended petition was filed claiming same amount of interest from January 1st, 1903, which increased the amount to exceed Two Hundred Dollars, and judgment rendered for \$204.15, held on appeal that the county court had jurisdiction.

CONTRA: *Chicago R. I. & G. Ry. Co. v. Crenshaw*, 112 S. W. 117 (51 C. A. 198).

The allegation in an amended petition, in an action against a carrier for \$192 for damages to a shipment of cattle, filed in the county court on appeal from a justice's court, that plaintiff claims damages to the cattle amounting to \$200, followed by a prayer for judgment for such damages, with interest and costs, puts the amount in controversy beyond \$200, and ousts the jurisdiction of the county court to determine the case, though in determining the amount in controversy as affecting the jurisdiction of the trial court, an amended petition speaks from the date of the original institution of the suit, unless it

sets up a new case of action, or increases the amount originally sued for, so as to claim an amount not within the jurisdiction of the court.

NOTE.

The Hunt case was decided by the Court of Civil Appeals for the Third District, and the Crenshaw case was decided by Court of Civil Appeals for the Second District.

The conflict between the above cases arises from the construction of Sec. 19, Art. 5 of the Constitution, which among other things provides "Justices of the Peace shall have jurisdiction in civil matters of all cases where the amount in controversy is \$200 or less, exclusive of interest." The Crenshaw case appears to be sustained by the Supreme Court in *Baker v. Smelser*, 88 T. 26, 29 S. W. 377, *S. A. & A. P. Ry. Co. v. Addison*, 96 T. 61, 70 S. W. 200, *Ft. W. & D. C. Ry. Co. v. Underwood*, 99 S. W. 92, and *Gulf W. T. & P. Ry. Co. v. Fromme*, 98 T. 459, 84 S. W. 1054. Wherein it is held that in cases where the statute does not expressly provide for the recovery of interest and it is allowed by way of damages, it becomes a part of the amount in controversy.

The statute, Art. 3097, defining interest, provides:

"Interest is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or the detention of money."

Where interest is claimed under the above provision it does not become a part of the amount in controversy.

Interest has been allowed by way of damages in the following cases:

When the injured party is entitled to indemnity for loss, *Houston & T. C. Ry. Co. v. Jackson*, 62 T. 209; *Willis v. Whitsitt*, 67 T. 673, 4 S. W. 253; *Heidenheimer v. Ellis*, 67 T. 423, 3 S. W. 666.

On breach of contract to deliver personal property: *Calvitt v. McFadden*, 13 T. 324; *Masterson v. Goodlett*, 46 T. 403; *Heilbronner v. Douglas*, 45 T. 406.

For the conversion of personal property: *Grimes v. Watkins*, 59 T. 140; *Hudson v. Wilkerson*, 61 T. 610; *Muse v. Burnes*, 3 W. & W., Sec. 76.

Breach of warranty on sales of chattels: *Anderson v. Duffield*, 8 T. 237; *Scranton v. Tilley*, 16 T. 183; *Anding v. Perkins*, 29 T. 348.

Breach of warranty on sale of land: *Turner v. Miller*, 42 T. 418; *Glenn v. Matthews*, 44 T. 400; *Brown v. Hearon*, 66 T. 63, 17 S. W. 395.

Failure of carrier to transport and deliver property. *Houston & T. C. Ry. Co. v. Jacoson*, 62 T. 209; *Fowler v. Davenport*, 21 T. 635; *Wolff v. Lacy*, 30 T. 350; *Watkins v. Junker*, 90 T. 584, 40 S. W. 11.

There is a sharp conflict in the decisions, however, on questions as to whether interest can be recovered for goods lost or stock killed by a carrier, and whether it can be recovered as a matter of law or by way of damages. See King's Conflicting Cases, Secs. 138, 239, 466, 467, 468, 539, 179, 187, 238 and 472.

**§ 244. Texas & P. Ry. Co. v. Mugg & Dryden, 83 S. W. 800
(98 T. 352, 107 A. S. R. 633).**

Where an agent of a railroad misrepresents to a shipper the freight rate on an Interstate shipment, which rate is less than the published rate established by the Interstate Commerce Commission, and the shipper on the faith of the lower rate makes contracts of sale, the railway company is liable to the shipper for damages by reason of such misrepresentation.

OVERRULED: Texas & P. Ry. Co. v. Mugg & Dryden, 202 U. S. 242 (26 S. C. 244).

A common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission and posted in the stations of such carrier, as required by the interstate commerce act, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted.

NOTE.

The Texas Court of Civil Appeals for the Second Supreme Judicial District certified the question to the Texas Supreme Court, and was answered as above set forth, the case was then taken to the Supreme Court of the United States, and in that court upon the authority of G. C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98 (15 S. C. 802), the Texas Courts were reversed and it was held by a unanimous court that the railway under such circumstances would not be liable for damages.

The Texas decision as set forth in 83 S. W. 800, has been cited with approval in the following cases: C. R. I. & P. Ry. Co. v. Gardner, 86 S. W. 793; G. C. & S. F. Ry. Co. v. Jackson, 86 S. W. 52; Cleghon v. Barstow Irrigation Co., 93 S. W. 1020 (41 C. 531).

In the Jackson case the point decided was that a railway might lawfully contract to furnish a shipper a solid train for the transportation of his freight, unmixed with the freight of others.

In the Gardner case, it was decided that until the printed Tariff rates published by the Interstate Commerce Commission were posted at the particular station from which the shipment was sent and where the contract was made, the contracts properly made at a less rate were not affected.

And in the Barstow Irrigation case, the Mugg case was simply cited as authority for the general proposition that a corporation is liable for damages caused by the misrepresentation of its agents, when made in the course of their business.

Thus it will be seen that in none of these cases citing the Mugg case was the same point involved that was involved in that case, and it seems to have been cited more as an example of how far Courts have gone than as authority.

The case of T. & P. Ry. Co. v. Leslie, 131 S. W. 824 (C. A.), follows the decision of the Federal Court and a writ of error was denied by the Supreme Court of Texas.

**§ 245. Texas & P. Ry. Co. v. Webb, 72 S. W. 1044
(31 C. A. 498).**

Under the Revised Statutes, Art. 4560f—providing that every corporation operating a railroad in the state shall be liable for all damages sustained by any servant, *while engaged in operating its cars, locomotives, or trains*, by reason of the negligence of any other servant, and the fact that such servants are fellow servants shall not impair such liability; held, that where a push car which was operated by plaintiff and another from a crusher to the quarry, there loaded by him and another, and then reconveyed to the crusher by mounting the car and regulating its speed on the down grade by use of brakes, and plaintiff was injured while the car was standing still and he and another were engaged in loading same, by a piece of rock thrown on the car by such other person, he was within the protection of the statute and was entitled to recover for the negligence of such other, notwithstanding he was a fellow servant.

CONTRA: (Overruled) Texarkana & Ft. S. Ry. Co. v. Anderson, 118 S. W. 126 (102 T. 402).

The Statute (*supra*) only has application to such cases,

where the injuries arise out of the "operation of the car," and the fact that a part of plaintiff's duties is to operate the car, if he is not injured while performing that part of his duties, is no reason for allowing recovery for the negligence of a fellow servant. Therefore where a car is standing still, in other words, not being "operated," and plaintiff is engaged with others in loading the car, and he is injured by the negligence of a fellow servant, he is not within the protection of the statute and can not recover. The reason for the statute is the extra hazardous nature of the performance of operating trains and cars, and where he is simply engaged in loading a car he is in no more danger than he would be were he engaged in loading a wagon and the expression to the contrary in *T. & P. Ry. Co. v. Webb* (*supra*) are disapproved and must be no longer considered authority.

NOTE.

The overruling case contains a complete list of authorities, an examination of which discloses that the *Webb* case stood alone in carrying the doctrine to the extent stated.

§ 246. *Thomas v. Tompkins*, 105 S. W. 1175 (47 C. A. 592).
(— C. A. —).

In an action of trespass to try title, a deed offered in evidence gave the length and direction of three lines, running from the beginning point south, east and north to a well-defined point, thence calling to go west and south far enough to include 400 acres conveyed. There was nothing to indicate that the lines thus given would not close, but a calculation demonstrated that a line running from the northeast corner only such a distance west as that a line running south from the northwest corner would reach the beginning point would not embrace the 400 acres within the boundaries described. Held the description fatally defective in the absence of allegations and proof of extraneous facts, which would clear up the misdescription.

CONTRA: *Mansel v. Castles*, 93 T. 414 (55 S. W. 559).

A description of land by boundary lines running from the beginning point S. 45 W. 906 vrs; hence N. 45 W. 555 varas; thence S. 45 E. 550 varas, to the beginning shows an obvious omission of one call, between the second and third, which may be supplied with reasonable certainty, and such description is as sufficient in a partition decree of foreclosure, as it would be in a deed.

NOTE.

The first or overruled case was decided by the Court of Civil Appeals for the first district, Associate Justice Pleasants delivering the opinion, it was reversed, and on the second appeal to the same court Associate Justice McMeans delivered the opinion, and when his attention was called to the fact that the opinion first rendered was in conflict with the decision of the Supreme Court in the case of *Mansel v. Castles*, he changed his opinion and held that the deed was admissible.

The following authorities are in accord with the Supreme Court: *Montgomery v. Carlton*, 56 T. 361; *Coffey v. Hendricks*, 66 T. 676 (2 S. W. 47); *Sanger v. Roberts*, 92 T. 312 (48 S. W. 1); *City of Oak Cliff v. Gill*, 77 S. W. 24.

§ 247. *Thompson v. Chaffe*, 89 S. W. 285 (39 C. A. 567).

Where a contractor has undertaken the construction of a house upon plans furnished by the owner, and the house falls by reason of the defective plans, the contractor is not liable for the damage occasioned.

CONTRA: *Loneragan v. S. A. Trust Co.*, 101 T. 63 (104 S. W. 1061; 22 L. R. A. (N. S.) 364; 130 A. S. 803; 133 A. S. 307n).

The case of *Thompson v. Chaffe* is not a well considered case upon the above point, and the doctrine above was not necessary for its decision. A contractor undertaking to erect a building in accordance with plans and specifications furnished by the owner's architect, and to the satisfaction of said architect, where the building falls before it is finished, is not relieved from his obligation to restore and complete it

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under his contract by showing that its collapse was due to defects in the specifications prepared for the owner by the architect and made a part of the contract.

NOTE.

The Supreme Court in the Lonergan case practically puts its decision upon the fact that the contractor was in probably a better position to understand the plans and specifications than the owner, and if they were defective to discover the defect, and if he did not care to undertake the construction of the building upon such defective plans, etc., all he had to do was to refuse to make the contract, but if he contracted to build on such defective plans, etc., he cannot avoid the contract by such a defense.

The Lonergan case is cited with approval upon this point in *Chapman v. Warden*, 110 S. W. 533 (50 C. A. 282).

§ 248. *Thompson v. Cragg*, 24 T. 582.

Where a league of land is granted to a married man and he gave a bond for title, and after his death a decree in probate was entered authorizing a commissioner appointed by the court to convey the land in satisfaction of the bond, it is held, that neither the bond, decree nor deed of the commissioner constituted title or color of title as would support the plea of the statute of three years against the children suing as heirs of their mother.

CONTRA: *Baldwin v. Root*, 90 T. 546 (40 C. A. 3).

See Sec. 258, *Veramendi v. Hutchins*.

§ 249. *Thompson v. Pine*, 55 T. 427.

It is not necessary in a petition for writ of error to state the names of the persons adversely interested, and if the names appear in the bond or other paper in the proceedings the clerk can look to such papers for the names of the persons to be cited, and when necessary the petition for the writ of error may be amended in the Supreme Court, and the names of persons omitted inserted.

CONTRA: *Weems v. Watson*, 91 T. 35 (40 S. W. 722).

See Sec. 98, *Hillebrant v. Brewer*.

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§ 250. *Thompson v. Railway Co.*, 32 S. W. 427 (11 C. A. 145).

The Act of the Legislature creating the Railway Commission, does not enjoin a railway from contracting to carry freight at a less rate than the rate fixed by the Railway Commission, provided it makes no discrimination.

CONTRA: *Texas Central Ry. Co. v. Kerns*, 108 S. W. 187 (C. A.).

In every contract of shipment in this state the law writes the particular rate fixed and authorized by the Railway Commission of Texas. And neither the initial carrier in this state nor its connecting carrier in this state can lawfully depart therefrom. To knowingly charge a less rate than provided by the Railway Commission is a violation of the law, and such contract is illegal.

NOTE.

In *Texas Mexican Ry. Co. v. Reed*, 121 S. W. 524 (C. A.), notice is taken by the Court of the apparent conflict between the cases mentioned above, but the court expressly stated that in the case under consideration it was not necessary to attempt to reconcile the two cases. The case does hold, however, that unless it is shown by the evidence that such lower rate was open to all that it would be illegal and void. A writ of error was refused by the Supreme Court in this case.

§ 251. *Threadgill v. Bickerstaff*, 26 S. W. 739 (7 C. A. 406).

A certificate stating that more than one person appeared before the officer to acknowledge the instrument, and that "he" acknowledged that he executed it, does not entitle the instrument to record.

OVERRULED: *Hughes v. Wright*, 100 T. 511 (101 S. W. 789; 11 L. R. A. [N. S.] 643n; 123 A. S. R. 827).

A certificate stating that more than one person appeared before the officer to acknowledge the instrument, and the "he" acknowledged that he executed it, does entitle the instrument to record.

NOTE.

The overruled case is by the Court of Civil Appeals for the Third District, and was reviewed on writ of error by the Supreme Court (87 T. 520, 29 S. W. 757), but the question in conflict was not passed upon. The overruling case is by the Supreme Court, while not in express terms overruling the Threadgill case, enough is said to indicate disapproval. The certificate in the overruling case is as follows:

"The State of Texas, County of Franklin. Before me, R. W. Holbrook, Clerk of the District Court in and for the county of Franklin, in the State of Texas, on this day personally appeared S. M. Spear and A. M. Temple, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed."

While the certificate in the overruled case is as follows:

"State of Texas, County of Parker. Before me, J. K. P. Shirley, notary public in and for said county and state, on this day personally appeared Caroline E. Carey, Horace Baker, and C. C. Baker, to me known to be the person whose names subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed."

Thus it will be seen that in both certificates the word "he" was used instead of "each" as required by the statute. The Court of Civil Appeals holding that as each party to the deed must acknowledge, it is impossible to determine to whom the word "he" refers, hence bad for uncertainty. While the Supreme Court holds, that as the act is not one which the grantors could perform jointly, the word "each" can be supplied by construction, hence sufficient compliance with the statute.

The following cases discuss the validity of similar acknowledgments: *Belcher v. Weaver*, 46 T. 293; *Durst v. Daugherty*, 81 T. 650 (17 S. W. 388); *Belbaze v. Ratto*, 69 T. 636 (7 S. W. 501); *Huff v. Webb*, 64 T. 284; *Deen v. Wills*, 21 T. 645; *Monroe v. Arledge*, 23 T. 481; *McDaniel v. Needham*, 61 T. 271; *Cavit v. Archer*, 52 T. 169; *Heintz v. O'Donnell*, 42 S. W. 598 (17 C. A. 21); *Kane v. Sholars*, 90 S. W. 937 (41 C. A. 154); *Gray v. Kaufman*, 82 T. 79 (17 S. W. 513); for decisions from other states on the question in conflict, see *Livingstone v. Kettelle*, 41 Am. Dec. 176 note.

§ 252. *Tidball v. Eichoff*, 66 T. 58 (17 S. W. 263).

The rule is that "Jurisdiction, so far as the matter or amount in value is concerned, must be determined by the petition, and that question is concluded by its averments, in so far as they state facts in relation to the thing in controversy, unless it otherwise appears that a plaintiff in framing his petition has improperly sought to give jurisdiction where it does not properly belong." In which event the pleadings must aver the fraud.

CONTRA: *Western Union Telegraph Co. v. Arnold*, 97 T. 383 (79 S. W. 8).

Where it appears on exceptions to a petition that the only cause of action shown is one for a sum below the jurisdiction of the District Court in amount, the action should be dismissed.

NOTE.

The *Arnold* case illustrates very clearly the distinction that exists between a case where the amount is brought below the jurisdiction of the court by exceptions, viz., by law points showing that *at law* the plaintiff only had a cause of action for a less amount than would confer jurisdiction, and a case where the petition claims an amount that would confer jurisdiction but the evidence, viz., the facts show that plaintiff was only entitled to recover an amount smaller than the jurisdictional amount.

In the case where by exceptions the amount is reduced below the jurisdiction, the *Arnold* case decides that the Court could not retain jurisdiction, but must dismiss the cause, and overrules the *Tidball* case. In the case where it appears upon the trial by evidence that the plaintiff is only entitled to an amount smaller than would originally have conferred jurisdiction, the court retains jurisdiction and renders the judgment for such smaller amount. This is the doctrine announced in the case of *Ablowich v. Bank*, 95 T. 429 (67 S. W. 881), in which a number of cases were overruled. (See *King's Conflicting Cases*, Vol. 3, Sec. 11.)

The *Arnold* case reached the Supreme Court from the Court of Civil Appeals of the Third Judicial District upon certificate of dissent, Chief Justice Fisher writing the majority opinion, which the Supreme Court adopted, and Justice Key writing the dissenting opinion, which the Supreme Court refused to follow. In its opinion

the Supreme Court refers to Chief Justice Fisher's opinion as showing the clear distinction existing. This opinion which carefully cites the authorities should be examined. (See *Western Union Tel. Co. v. Arnold*, 77 S. W. 249, 33 C. A. 306).

The *Tidball* case cites *Dwyer v. Bassett*, 63 T. 274, as authority for its holding. An examination of that case leaves the matter in doubt as to whether the amount was reduced by the evidence or by exceptions. In the statement of the case, it is said:

"Dwyer answered by general denial and claimed that the sum paid cancelled the security which was delivered up to him."

Thus indicating that there were no exceptions. If it was reduced by the evidence then it comes within the exception pointed out in the *Arnold* and *Ablowich* cases, if by the exceptions, then it is in conflict with the *Arnold* case and must also be considered overruled.

The *Arnold* case has been followed by a number of cases, to-wit. *Rucker v. Campbell*, 79 S. W. 627 (35 C. A. 178); writ of error denied by the Supreme Court. *St. Louis S. W. Ry. Co. v. Hill*, 97 T. 506 (80 S. W. 368); *Western U. Tel. Co. v. Siddal*, 86 S. W. 343 (C. A.); *Carswell v. Habberzettie*, 99 T. 1 (86 S. W. 738, 122 A. S. R. 597); *Texas & P. Ry. Co. v. Butler*, 86 S. W. 800 (C. A.); *Franklin Life Ins. Co. v. Blackwell*, 87 S. W. 361 (C. A.); *Carswell v. Habberzettie*, 87 S. W. 911 (39 C. A. 493); *Walker v. Woody*, 89 S. W. 789 (40 C. A. 346), writ of error denied by the Supreme Court. *I. & G. N. Ry. Co. v. Voss*, 99 S. W. 189 (C. A.); *Continental Casualty Co. v. Morris*, 102 S. W. 773 (46 C. A. 394); *Wells Fargo & Co. v. Burford*, 126 S. W. 927 (C. A.); *Jackson v. Persons*, 129 S. W. 639 (C. A.).

§ 253. *Titel v. Garland*, 87 S. W. 1152 (99 T. 201).

We are of the opinion that a suit of this character cannot be maintained. The claimant under the statute of limitation should be able to say not only that "I claimed 160 acres out of that land," but also that he claimed some specific tract of land, either more or less than 160 acres.

CONTRA: *Davis v. Houston Oil Co.*, 111 S. W. 219 (50 C. A. 597).

In the present case appellant's improvements, his dwelling house, and small farm were substantially in the center of the 160 acres claimed and certainly afforded a sufficient notice of an appropriation of some of the land. Notwithstanding the

want of notoriety as to the exact limits of the land so claimed and intended to be appropriated, as embracing the 160 acres, we are of the opinion that Davis' possession was sufficient notice of that fact and entitled appellants to the entire 160 acres under his limitation title.

NOTE.

While the first case was decided by the Supreme Court, the language quoted, while taken from Judge Gaines' opinion, was used by the Court of Appeals (85 S. W. 466), and while affirming the judgment it was evidently not the intention of the Supreme Court to approve the language, except so far as it might apply to a possessor encroaching upon an adjoining survey.

See Sec. 184, *Rice v. Goolsbee*, and note for further decisions of this and kindred conflicts.

§ 254. *Tolle v. Correth*, 31 T. 362 (98 Am. Dec. 540).

"It may be admitted that the purpose of irrigation is one of natural use, such as thirst of people and cattle, and household purposes, which must absolutely be supplied."

CONTRA: *Watkins Land Co. v. Clements* 98 T. 578 (70 L. R. A. 954, 107 A. S. R. 653, 86 S. W. 733).

"The facts of the case (in *Rhodes v. Whitehead*) did not raise the issue of the right to appropriate the water for purposes of irrigation and the statement by Judge Moore as above quoted is dicta." In all countries and under all circumstances water is necessary for the support of animal life and to answer the demands of other domestic uses. Therefore the law denominates its use for such purposes as natural, and accords to it preference over the demands of irrigation and manufacturing. Subject to this right of natural use by other riparian properties, each riparian owner is entitled to use the water of a stream which flows by or through his land for the purposes of irrigation, provided such use is reasonable, considering all of the circumstances.

NOTE.

See Sec. 183, *Rhodes v. Whitehead*.

§ 255. Tomkins v. Brooks, 43 S. W. 70 (C. A.).

An instrument in the form of a bond for title reciting the consideration paid and using the words, bargained, sold and delivered, conveyed and alienated, with the usual covenants, to execute a deed does not convey the legal title.

CONTRA: Baker v. Westcott, 73 T. 129 (11 S. W. 157).

Whenever the language of the conveyance evidences the intention of the grantor to convey the entire dominion, ownership, and control of the land immediately to the grantee, it should be held as a conveyance of the legal title, and as it conveyed the legal title, the obligation to make further title does not obviate its effect as a conveyance.

NOTE.

The first case is by the Court of Civil Appeals for the First District, in which a writ of error was denied by the Supreme Court, while the second case is by the Supreme Court. In Tenzler v. Tyrrell, 75 S. W. 56 (32 C. A. 443), by the Court of Civil Appeals for the Fourth District where the same issue arose, the Court calls attention to the conflict but does not expressly pass upon the question, but the effect of that decision is to hold with the Baker case, for it holds that the vendee under a bond for title, can successfully plead the statute of limitation of three years which can not be done by the holder of the equitable title, for the reason that there is a break in the chain of title when the legal title is held by another.

The question in conflict becomes material where any of the following issues are involved:

1st: If the title is equitable, stale demand may be set up, and when the title is legal it can not. *Abernathy v. Stone*, 81 T. 434 (16 S. W. 1102); *Steiller v. Hooper*, 66 T. 353 (1 S. W. 317).

2nd: If the title is legal it can be used as an outstanding title without claiming under it, while if equitable you must connect yourself with it. *Pool v. Foster*, 49 S. W. 924; *Capt v. Stubbs*, 68 T. 224 (4 S. W. 467); *Kauffman v. Shetworth*, 64 T. 181; *Dupree v. Frank*, 39 S. W. 988; *Capp v. Terry*, 75 T. 403 (13 S. W. 52); *Shields v. Hunt*, 45 T. 428; *Goode v. Jasper*, 71 T. 52 (9 S. W. 132); *Johnson v. Timmons*, 50 T. 521; *Fitch v. Boyer*, 51 T. 348; *Lewis v. Corey*, 64 T. 596.

3rd: When a conflict arises between the legal and equitable title, the burden is on the holder of the equitable to prove notice of it, when the legal title was acquired.

See Sec. 67 for conflict on question as to whether the community heir holds the legal or equitable title, and Sec. 2 as to whether the transfer of a land certificate carries the legal or equitable title.

§ 256. Troy Buggy Works v. Fife, 74 S. W. 956 (C. A.).

Under the Anti-trust Law of 1899 (Laws of 26th Legis. 246, Ch. 146), making void any agreement to limit the trade in any article or limit competition, a contract whereby a manufacturer of vehicles agreed with a dealer not to sell to any other person in certain cities, was void.

CONTRA: Norton v. W. H. Thomas & Sons, 99 T. 578 (91 S. W. 780; 23 L. N. S. 1277).

An agreement on a contract for sale of merchandise that the vendor would not sell such merchandise in certain cities to any other person until the vendee had closed out his purchase was not prohibited by the Anti-trust Law of 1899. The prohibition in Section 1 of such law of agreements "to fix or limit the amount or quantity of any article" embraces limitations on the amount or quantity in existence, not on that to be sold in or supplied to any particular community or territory. And Section 6 of said law, prohibits agreements limiting trade, competition, etc., to *members of the pool, trust, etc.*, and does not cover agreement not to sell within specified limits.

NOTE.

The Supreme Court, in the Norton case disapproves of the case of Francis-Simmons & Co. v. Terry, 79 S. W. 1103, as well as the Troy Buggy Co. case.

The Forest Photographic Co. v. Hutchinson Grocery Co., 108 S. W. 768 (C. A.), the Fourth Court of Civil Appeals, the court that had decided the Troy Buggy Co. case, followed the Supreme Court, and without argument acquiesced in the decision. This latter case goes further, however, and holds that such a contract is not violative of the acts of 1895 (Revised Statutes), nor of amendments of 1903, (Gen. Laws 1903-119, Ch. 94).

It therefore seems that such a contract is at present conceded not to be in violation of law.

§ 257. *Ullman v. Devereux*, 102 S. W. 1162 (46 C. A. 459).

In a suit for the conversion of mortgaged real property the proper measure of damages is the difference between the value of the property *at the time of the conversion* and the amount of the debt.

CONTRA: *Booth v. Fiest*, 80 T. 141 (15 S. W. 799).

In a suit for the conversion of property held by deed absolute to secure a debt and which had passed into the hands of an innocent purchaser, the measure of plaintiff's damage is the value of the land at the day of the trial less the secured debt and interest.

NOTE.

There is some doubt as to whether there is a conflict between the above two cases, but Judge Stephens of the Court of Civil Appeals for the Second District who delivered the opinion in the *Ullman* case seemed to be in doubt as to whether the principle he announced was in conflict with the *Booth* case.

Judge Gaines in the *Booth* case cites the case of *Phillips v. Herndon*, 78 T. 378 (14 S. W. 857), as holding the same doctrine, however by reference to that case it will be seen that the measure of damage was fixed at the value of the land at the time it was appropriated.

The case of *Nixon v. Miles*, 92 T. 318 (47 S. W. 966); by the Supreme Court, is in accord with the *Booth* case in holding the measure to be the value at the time of the trial.

In *McCord v. Nabors*, 101 T. 495 (109 S. W. 916), by the Supreme Court, approving the *Booth* case, it is held: The measure of damage for misappropriation of real property by a trustee, is its value at the time of trial and not its value at the time of appropriation with interest.

In *Schneider v. Sellers*, 98 T. 380 (84 S. W. 421), by the Supreme Court, it was held, that the measure of damage was the rent of the land from the time it was acquired up to the time it was misappropriated, together with the value of the land at the date of misappropriation with six per cent interest thereon.

In *Selleman v. Gano*, 90 T. 637 (39 S. W. 562), by the Supreme Court, where the mortgagee refuses to allow the mortgagor to redeem in violation of agreement and sells to an innocent purchaser, the measure of damage is the value of the land less the mortgage debt. The time when the value is to be fixed is not stated.

In *Espey v. Boone*, 75 S. W. 570 (33 C. A. 83), by the Court of Civil Appeals for the First District, it is held that plaintiff is entitled to recover the value of the property of which he has been deprived, but does not state the date at which the value is to be fixed, but cites the *Booth* case.

In *Loomis v. Satterthwaite*, 25 S. W. 69 (C. A.), by the Court of Civil Appeals for the Fourth District, it is held that the measure of damage is "the full value" of the land, without stating time when the value is to be fixed.

It is difficult to see on what principle the measure of damage should be different in suits for the conversion of real property and for conversion of personal property. In *Gillis v. Wofford*, 26 T. 77; *Blum v. Merchant*, 58 T. 404; *Blum v. Thomas*, 60 T. 161; *Houghton v. Puryear*, 30 S. W. 583 (10 C. A. 384); *Smith v. Bates*, 27 S. W. 1044; *Daugherty v. Lady*, 73 S. W. 837; and many others, it is held, that in suits for the conversion of personal property, the measure of damage is its value at the time of the conversion, except in *Stephenson v. Price*, 30 T. 715, by the Military Supreme Court, it is held, that the measure of damage is the highest price between the time of the demand and the day of trial.

The rule in the *Ullman* case if allowed to prevail would not compensate plaintiff for the full loss suffered, for it often happens that the property has greatly enhanced in value between the time of conversion and the date of trial, and to so hold he would, by the wrongful act of the defendant, be deprived of the value which he would have received had the wrong not been committed.

It is very evident from the the weight of authority as gathered from the cases above cited, the measure of the plaintiff's recovery will be controlled by his pleading, and if his pleading is broad enough to cover the value of the property both at the date of conversion and the date of trial, the latter will govern. In other words the rule as announced in the *Booth* case, "the value of the land at the day of trial" will prevail.

§ 258. *Verameudi v. Hutchins*, 48 T. 554 (56 T. 421).

An unauthorized conveyance, by the surviving husband, of community property, after the death of the wife, does not convey title, or color of title, to the interest therein vested in her heirs; and as to such interest such conveyance will not support a defense of limitation of three years.

CONTRA: *Baldwin v. Root*, 90 T. 546 (40 S. W. 3).

Where community land is patented to the heirs of their deceased father (without naming them), they hold the legal title, while the title of their deceased mother and her heirs is equitable, and a purchaser from the heirs of the father thereby holds by color of title, and can assert the statute of limitation of three years against the equitable title of the mother's heirs.

NOTE.

The first case is supported by *Cole v. Grigsby*, 89 T. 229 (35 S. W. 792); *Thompson v. Cragg*, 24 T. 582; and *Hardy Oil Co. v. Burnham*, 124 S. W. 221. It is very evident that both the *Veramendi* case and the three cases in accord with it were based upon the assumption, that the legal title to community land was not in the marital partner in whose name the conveyance was made, but in the community, and on the death of the other partner, his or her heirs inherited one-half with the legal title thereto. There is no doubt that this was the law in this state as decided in the cases of *Duncan v. Rawls*, 16 T. 501; *Love v. Robertson*, 7 T. 9; *Edwards v. James*, 7 T. 373; *Nuston v. Curl*, 8 T. 240; *Robinson v. McDonald*, 11 T. 390; *Jones v. Jones*, 15 T. 143; *Thompson v. Cragg*, 24 T. 600; *McGee v. Rice*, 37 T. 501; *Monroe v. Leigh*, 15 T. 519; *Yancy v. Batte*, 48 T. 46; *Johnson v. Harrison*, 48 T. 257.

But a departure from this rule began with the dissenting opinion of Judge Moore in the case of *Yancy v. Batte*, 48 T. 46, and afterwards in the case of *Hill v. Moore*, 62 T. 610, the dissenting opinion of Judge Moore became the opinion of the Court, wherein it is held that the legal title as distinguished from the equitable is in the marital partner to whom the deed is made, and on the death of one, his or her heirs inherit the same character of title, and that a purchaser for value from the marital partner who has the legal title, or apparent right of disposition, without notice of the rights of the other partner will be protected and he thereby acquires the legal title to the whole.

The opinion in the case of *Hill v. Moore*, has been followed in the cases of *Patty v. Middleton*, 82 T. 582 (17 S. W. 909); *Edwards v. Brown*, 68 T. 329 (4 S. W. 380; 5 S. W. 87); *Ross v. Kornrumpf*, 64 T. 394; *Sanborn v. Schuller*, 86 T. 116 (23 S. W. 641); *Kirby v. Moody*, 84 T. 203 (19 S. W. 453); *Ippenheimer v. Robinson*, 87 T. 174 (27 S. W. 95); *Japhet v. Stiles*, 84 T. 91 (19 S. W. 450); *Puncey v. May*, 76 T. 65 (13 S. W. 383); *Lyster v. Leighton*, 81 S. W. 1033 (36 C. A. 62); *Derrett v. Britton*, 89 S. W. 562; *Daniel v. Mason*,

50 T. 240 (38 S. W. 161); *Hensley v. Lewis*, 82 T. 295 (17 S. W. 913); *McHill v. Moore*, 85 T. 335 (19 S. W. 162); *Texas Loan Agency v. Taylor*, 88 T. 47 (29 C. A. 1057); *Brown v. Elmendorf*, 87 T. 56 (26 S. W. 1043); *Holland v. Couts*, 98 S. W. 231. The principle therein announced has now become a settled rule of property in this state. It necessarily follows as a legal consequence, that as the legal title is in the marital partner to whom the deed is made, and a purchaser from him acquires the same character of title, then the title thus acquired is title or color of title within the meaning of the statute of limitations of three years.

Under the law as it stood when the cases of *Veramendi v. Hutchins* and *Thompson v. Cragg* were decided, the legal title was in the community, and as necessary consequence a purchaser from the community survivor who had the apparent right of disposition did not thereby acquire title or color of title against the one-half owned by the community heirs. Therefore those decisions were right in then holding that the statute of limitation of three years could not be urged by a purchaser from a survivor, for he did not thereby acquire title or color of title to any part except the one-half interest of the survivor. For if the purchaser only acquired from the survivor a legal title to one-half, then there was a hiatus in his title to the other half.

But when the rule as announced in *Veramendi v. Hutchins*, was changed the principles predicated upon the changed rule was also changed, and any consequences flowing from the rule must cease when the rule ceased. In other words, as the recent authorities place the legal title in the survivor to the whole of the land, then a purchaser under him holds the legal title by consecutive chain of transfer and he has thereby "title or color title" which enables him to assert the bar of the statute of three years. The other two cases *Cole v. Grigsby*, and *Hardy Oil Co. v. Burnham*, holding with the *Veramendi* case, were decided since the change of the rule concerning the legal title and the opinion in those two cases can be accounted for only on the ground that the judges who wrote them overlooked the fact that the change of the rule would necessarily change the result.

The cases of *Burleson v. Burleson*, 28 T. 383; *Browning v. Pumfrey*, 81 T. 163 (16 S. W. 870); *Grigsby v. May*, 84 T. 248 (19 S. W. 343), are in accord with the *Baldwin v. Root* case.

In the case of *League v. Rogan*, 59 T. 427, approving the *Veramendi* case, an attempt is made to draw a distinction between conveyances prior to and subsequent to the grant, and intimating that want of power in grantor in a subsequent conveyance will prevent his deed being color of title; but this is effectually disposed of by

Judge Stayton in the case of *Grigsby v. May*, 84 T. 255 (19 S. W. 343), wherein he says:

"The proposition that a conveyance subsequent to the grant from the sovereignty must in fact convey the property has already to some extent been noticed; but we will say further, that to so hold would make it impossible, in case a grant from the government did not convey the superior right to the land, for any person other than the immediate grantee from the government to defend under adverse possession for three years; and it would be a useless consumption of time to cite the cases which show that no such rule has ever been recognized. If by this proposition be meant that any conveyance subsequent to the grant must confer a higher right than does the grant, then it requires the stream in its downward flow to rise higher than its source while the statute protects any person having three years adverse possession who can show a regular chain of transfer from or under the sovereignty of the soil conveying what the grant purports to convey. The conveyances in the chain must be sufficient to do that, assuming that they are sufficient if they be executed by the proper persons, as conveyances of land are required to be, and on their faces purport to convey the land described in the original grant."

To the casual reader it may appear that a purchaser from the community survivor holding the legal title and who buys with notice of the rights of the community heirs could not acquire the title under the statute of limitation of three years. But the contrary is held by Associate Justice Brown in the case of *Cole v. Grigsby*, 89 T. 229 (35 S. W. 223), who says:

"If the question of notice had been of any importance in this case, the fact that the land was granted as a headright to John Grigsby would be sufficient to charge the purchaser from his heirs with notice of the right of his wife and her heirs, but it was unimportant upon the question of limitation whether the parties had notice or not, and while it does not effect the judgment of the Court of Civil Appeals, we deem it proper to say that in so far as it was made to depend upon the facts of notice if so intended it is incorrect."

In some of the decisions the cases in conflict are sought to be distinguished upon the ground that a grant to the husband by the government of community lands is not hostile to the heirs of the deceased wife, and therefore is not title or color of title; while a grant of community lands to the heirs of the deceased husband is hostile to the heirs of the mother and is therefore title or color of title. This reasoning is not in accord with four rules repeatedly

announced by the Supreme Court, first: Where the grant by the government purports on its face to convey to the grantee all of its right, title and interest in and to the land granted, it is color of title although upon the trial it may be established that other parties than the original grantee have a superior title. Second: When a grant is made to one not entitled to receive it, still it is title or color of title. Third: In a grant to the heirs of the original grantee they take by inheritance and not by purchase and can thereby acquire no greater title than their ancestor had, and if his title was neither title nor color of title, neither could that which they inherit be title or color of title. Fourth: If a patent to the original grantee of the certificate is not hostile to the community heirs of the wife, then the title which descends to his heirs is not hostile to the community heirs of the wife, otherwise in the language of Judge Stayton "it requires the stream in its downward flow to rise higher than its source."

§ 259. Vogt v. Bexar County, 23 S. W. 1044 (5 C. A. 272).

Under the articles of the statutes providing for the laying out of public roads and highways (old articles 4359 et seq. new articles 4670 et seq.) The general authority given the County Commissioners upon their own motion to lay out a public road, is qualified by the term "as hereinafter prescribed," and the court cannot lay out such roads, without a jury of view, nor can they change the report of the jury and therefore as the statutes require a written notice of the intention to have a jury of view lay out a road, in the absence of this written notice, the land owner is not a party to the proceedings and hence cannot appeal, therefore a writ of injunction would lie against the County Commissioners to prevent the laying out of the road as changed.

CONTRA: Howe v. Rose, 80 S. W. 1019 (35 C A. 328).

Under the Constitution and statutes the County Commissioners have full power to lay out roads upon their own motion, and they have discretion in accepting or changing the report of the jury of view. The qualification or limitation in the statute "as herein after prescribed" applies alone to the discontinuance or alteration of a road already established.

Therefore even though a party has not been served with written notice, if he has notice of the proceedings; he may appeal from the order of the Commissioners and hence can not by an original suit enjoin the County Commissioners from opening a road.

NOTE.

See Sec. 47, *Cummings v. Kendall County*.

§ 260. *Votaw v. Pettigrew*, 38 S. W. 215 (15 C. A. 87).

The wife of a pre-emptor of public land has no vested rights in such land until completion of the residence necessary to entitle her husband to a patent, and on her death prior to that time her heirs take no interest therein.

OVERRULED: *Creamer v. Briscoe*, 101 T. 490 (109 S. W. 911, 130 A. S. R. 869, 17 L. R. A. [N. S.] 154n).

A husband and wife having settled on land for the purpose of acquiring a homestead donation from the State, the wife died and the husband married again before the expiration of three years occupancy necessary to acquire title; this being completed patent issued to the husband. Held, that the land was community property of the husband and first wife, and that, as against her heirs, the heirs of the second wife had no interest.

NOTE.

The overruled case was by the Court of Civil Appeals for the Fourth District in which a writ of error by the Supreme Court was denied. The overruling case was by the Supreme Court and the following cases are in accord with the overruling case; *Mills v. Brown*, 69 T. 246 (6 S. W. 612); *Clifton v. Thompson*, 29 S. W. 197; *Palmer v. Bennett*, 81 T. 451 (19 S. W. 304); *Manchaca v. Field*, 62 T. 139; *Porter v. Chronister*, 58 T. 54; *Wilkinson v. Wilkinson*, 20 T. 244; *Johnson v. Townsend*, 77 T. 639 (14 S. W. 233); *Welder v. Lambert*, 91 T. 521 (44 S. W. 281); *Busk v. Lowrie*, 86 T. 128 (23 S. W. 983). The cases of *Buford v. Bostick*, 58 T. 63; *Roberts v. Trout*, 35 S. W. 325 (13 C. A. 70); *Bishop v. Lusk*, 27 S. W. 306 (8 C. A. 32), and *Mitchell v. Nix*, 1 Posey 126, if not

expressly, at least by analogy support the overruled case. See King's Conflicting Cases, Vol. 2, Sec. 31, where there is a sharp conflict on the question as to whether a title by prescription beginning before marriage and completed during the marriage, is separate or community property. The note on the above conflict was written before the Supreme Court decided the case of Creamer v. Briscoe. In the case of Gafford v. Foster, 81 S. W. 63 (36 C. A. 56), by the Court of Civil Appeals for the Second District, where the husband during the marriage bought at tax sale 320 acres of land and took possession and claimed under the five years statute of limitation, but failed to record his tax deed till after the wife's death, held, that the property was separate and not community. The decision of the Supreme Court in the Creamer case being the latest expression of that Court must be construed as overruling not only the Votaw case but also Bufford v. Bostick, Roberts v. Trout, Bishop v. Lusk, Mitchell v. Nix and Gafford v. Foster. Then it must follow that where the wife dies before the three years' occupancy has been completed the title to the homestead donation is in the community, and when the wife dies before the bar is complete under the three, five or ten year statute, it is likewise community. There appears to be no decisions on the question involving the purchase of school land by payment of 1-40 of the purchase money and followed by three years occupancy. Query, is it separate or community when the first payment is made and occupancy begins during the marriage and the occupancy is completed after the wife's death?

§ 261. *Watson v. White*, 64 S. W. 826 (26 C. A. 442).

Under the law authorizing the sale of school land to actual settlers, a minor who is an actual settler thereon, has the same right to purchase as an adult person.

CONTRA: *Walker v. Rogan*, 93 T. 248 (54 S. W. 1018).

The Land Commissioner is not authorized to sell public school land to a minor, and a sale to him is not merely voidable but absolutely void.

NOTE.

The *Watson* case is by the Court of Civil Appeals for the Second District, in which a writ of error was denied by the Supreme Court. The same case was again tried by the Court of Civil Appeals with the same result, and a writ of error denied by the Supreme Court.

The Walker case is by the Supreme Court on petition for mandamus by a purchaser from a minor of public school land to compel the Land Commissioner to issue a patent. At the time this opinion was rendered (January, 1900), several of the Courts of Civil Appeals, had held directly to the contrary, none of which, however, are mentioned in the Supreme Court's opinion.

The cases in conflict with the opinion of the Supreme Court are as follows: *Weatherford v. McFadden*, 51 S. W. 548 (21 C. A. 260), by the Court of Civil Appeals for the Second District, minority will not bar an applicant from buying school land; *O'Keefe v. McPherson*, 61 S. W. 534 (25 C. A. 313), by the Court of Civil Appeals for the Second District, writ of error denied by the Supreme Court, disability of minority can not be urged by one who seeks to purchase school land after the commissioner awarded it to a minor. *Baldwin v. Salgado*, 135 S. W. 608 (C. A.), by the Court of Civil Appeals for the Fourth District, the commissioner is not authorized to forfeit a purchase of state school land on the ground of minority, altho the state can on that ground in a proceeding brought directly for that purpose; *Johnson v. Bibb*, 75 S. W. 71 (32 C. A. 471), by the Court of Civil Appeals for the Second District, writ of error denied by the Supreme Court. If a sale of school land to a minor was void it was validated by the Act of 1899, p. 257. *Taylor v. Lewis*, 85 S. W. 1011 (38 C. A. 390), by the Court of Civil Appeals for the Second District, writ of error denied by the Supreme Court. Sale of school land to a minor is not void if he continues to occupy it after reaching his majority.

The following cases are in accord with the Supreme Court's opinion in the Walker case. *Adams v. King*, 66 S. W. 484 (28 C. A. 17), by the Court of Civil Appeals for the Second District, writ of error denied. A sale of school land to a minor being void, a subsequent sale by him after arriving at majority would not amount to a ratification. *Dupree v. Duke*, 70 S. W. 561 (30 C. A. 360), by the Court of Civil Appeals for the Third District, the sale of school land to a minor is absolutely void against a subsequent actual settler in good faith. *Wurzbach v. Burkett*, 60 S. W. 590 (C. A.), by the Court of Civil Appeals for the Fourth District, writ of error denied: That one bought school land collusively for a minor who can not buy, is not ground for attacking the sale. *Walker v. Finlay*, 94 T. 145 (58 S. W. 941), by the Supreme Court. A purchase of school land by a minor being void, the commissioner on refusing to patent, cannot be mandamusd to refund the purchase money.

The decision of the Supreme Court in the case of *Walker v. Rogan*, to the effect that a sale of public school land to a minor is void, is based upon a construction of the several acts authorizing

the sale of such lands. The court reasons that when the Legislature authorized the commissioner to sell to "any person desiring to purchase" and provided that the person purchasing should execute his obligation for the balance of the purchase money, it contemplated that the sale could only be made to a person legally capable of executing the required obligation, and as a minor could not execute such an obligation, then he is not such a person authorized to buy and therefore a sale to him is not merely voidable but absolutely void.

In *Cunningham v. Robson*, 136 S. W. 441, the Supreme Court held; a petition for mandamus against the commissioner to compel him to award school land to a minor, will be denied where the judgment and record removing the minor's disability is silent as to the residence and age of the minor. While the same court in the cases of *Boozer v. Terrell*, 96 T. 635 (75 S. W. 482), and *Baldwin v. Salgado*, 135 S. W. 608, held, a mandamus will not issue against the commissioner to compel him to sell to a subsequent applicant on the ground that the previous sale to a minor being void, because the law has not given the commissioner the power to determine the question of minority. If this be correct then it was unnecessary to deny the writ in the *Cunningham* case on the ground of the invalidity of the judgment removing disability, because the writ could not issue in any event.

In *Anderson v. Neighbors*, 61 S. W. 145 (25 C. A. 504), by the Court of Civil Appeals for the Fourth District, writ of error denied by the Supreme Court, it is held, that a subsequent purchaser of school land cannot attack a previous sale to a married woman on that ground. In that case the purchase was made with the assent of the husband, as well as in the cases of *Lee v. Green*, 58 S. W. 847 (24 C. A. 109); *Barnett v. Murry*, 54 S. W. 784 (C. A.). If, however, the wife buys public school land without the assent of her husband, the same rule ought logically to apply to her, being under the disability of coverture, as to one under the disability of minority.

But in so far as the minor's right to purchase is concerned, the case of *Walker v. Rogan* by the Supreme Court holding such sales void must govern, and the cases above cited by the Courts of Civil Appeals holding to the contrary must be considered as overruled.

§ 262. *Watkins v. Walker Co.*, 18 T. 592 (70 Am. Dec. 298).

"Overseers of roads are the legally constituted agents of the counties from which they receive their appointments and what they do in the proper and necessary exercise of the authority

conferred upon them the county in its corporate capacity is responsible for."

LIMITED: Matthews Lumber Co. v. Van Zandt Co., 77 S. W. 960.

The remarks above quoted from *Watkins v. Walker Co.*, must be construed to have been made with reference to the particular facts of that case, and the authority conferred upon the road overseer by virtue of the particular statute under which he appeared to have acted (practically the same as art. 4744) and not as an authoritative expression that road overseers by reason of their relation to the county, have general authority to make contracts pertaining to the work imposed upon them, binding upon the county. The power to make such contracts is vested by law in the Commissioners Court.

NOTE.

The statute provides that road overseers may take timber, gravel, etc., to build causeways and bridges, most convenient therefor, in which case the owner shall be paid out of the county treasury a fair compensation to be determined by the Commissioners Court, upon the owner's application.

Thus it will be seen that no question of contract was involved in *Watkins v. Walker Co.*, yet the expression standing alone, might be construed as authorizing road overseers to make contracts binding upon the county, for material, etc.

In the Mathews case mention is made of the two cases of *Rutherford v. Harris Co.*, and *Monghon & Sisson v. Van Zandt Co.*, 3 Wilson's Civil Cases, Sec. 114 and 198. And it is claimed that they are virtually overruled by the case of *Fears v. Nacogdoches Co.*, 71 T. 337 (9 S. W. 265). An examination of the *Fears* case discloses that it makes no mention of either of the two cases. The *Fears* case was where a physician was compelled to give his services at two coroner's inquests. Held that the Justice of the Peace had no authority to bind the County and that the County was not liable for the services rendered.

CONFLICTING CASES. [§§ 863-265]

§ 263. Watts v. Bruce, 72 S. W. 258 (31 C. A. 347).

Under the statute of limitation of ten years, the possessor cannot claim to the limits of the boundary defined in his deed unless it be recorded.

OVERRULED: *Bringhurst v. Texas Company*, 87 S. W. 898 (39 C. A. 500).

See Sec. 51, *Doom v. Taylor*.

§ 264. Weatherford v. McFadden, 51 S. W. 548 (21 C. A. 260).

The only condition made essential by the law itself to the right to purchase school lands of the state being actual settlement, the disability of minority cannot be urged by one who seeks to purchase such land after the commissioner of the land office has awarded it to a minor.

CONTRA: *Walker v. Rogan*, 93 T. 248 (54 S. W. 1018).

See Sec. 261, *Watson v. White*.

§ 265. Webb v. Burney, 70 T. 322 (7 S. W. 841).

The mere fact that a man by imposing upon his wife through misrepresentations as to the character of the instrument, induces her to sign a conveyance of the homestead, in payment of a pre-existing debt, will not effect the rights of the purchaser, if he is ignorant of the husband's fraud.

CRITICISED: *Scoggin v. Mason*, 103 S. W. 831 (46 C. A. 480).

A pre-existing debt is not such a consideration for a conveyance of a homestead as will protect the grantee when the conveyance is attacked for fraud of the husband inducing the wife to join in the conveyance.

NOTE.

The criticised case is by the Commission of Appeals and the

criticising case is by the Court of Civil Appeals for the Third District, but neither was passed upon by the Supreme Court.

The cases of *Wiley v. Prince*, 21 T. 637, and *Waltee v. Weaver*, 57 T. 571, intimate the rule, that a pre-existing debt is not a sufficient consideration upon which to base the defense of a bona fide purchaser, by one buying through the fraud of the husband, but these two cases were questioned in the *Webb* case. See *King's Conflicting Cases*, Vol. 2, Sec. 503-529, written, however, before the *Scoggin* case was decided. Hence if the *Scoggin* case is considered the better authority then the *Wiley* and the *Waltee* cases must be considered as reinstated and the *Webb* case overruled.

It is undoubtedly the general rule in this State that a pre-existing debt while sufficient consideration to support a transfer, is not sufficient upon which to base the assertion of a bona fide purchaser. *Overstreet v. Manning*, 67 T. 657 (4 S. W. 248); *Hirsch v. Jones*, 42 S. W. 605; *Pride v. Whitfield*, 51 S. W. 1100; *Golson v. Fielder*, 21 S. W. 175 (2 C. A. 400); *Black v. Caviness*, 21 S. W. 635 (2 C. A. 118); (2 C. A. 400); *Black v. Caviness*, 21 S. W. 635 (2 C. A. 118); *Watkins v. Edwards*, 23 T. 443; *Ayres v. Duprey*, 27 T. 593; *Bailey v. Tindall*, 59 T. 540; *McKamey v. Thorp*, 61 T. 648; *Sweason v. Seale*, 28 S. W. 143; *Van Burkleo v. Southwestern Mfg. Co.*, 39 S. W. 1085; *Lewis v. Bell*, 40 S. W. 747; *Steffan v. Bank*, 69 T. 513 (6 S. W. 823).

The following cases are in accord with the criticised case; *Hartley v. Frosh*, 6 T. 210 (55 Am. Dec. 772); *Harrington v. McFarland*, 21 S. W. 116 (1 C. A. 289); *Hickman v. Hoffman*, 33 S. W. 257 (11 C. A. 605).

The following cases are in accord with the criticising case; *Frieberg v. DeLamar*, 27 S. W. 151 (7 C. A. 263); *Henke v. Stacy*, 61 S. W. 509 (25 C. A. 272); *Holland v. Ferris*, 107 S. W. 102; *Sparks v. Taylor*, 87 S. W. 740, 99 T. 411 (90 S. W. 485).

There appears to be no valid reason why an innocent purchaser from the husband in fraud of the wife's rights in payment of a pre-existing debt should be protected while he would not be protected as a bona fide purchaser from another against the superior title. From an examination of the above cases it will be readily seen that the weight of authority is with the criticising case.

§ 266. *Wells v. Moore*, 15 T. 521.

Where the plaintiff sues upon a bond and the defendant in a plea of *non est factum* admits the execution of the bond, but alleges a material alteration after its execution without his

consent, the burden is not upon the plaintiff to disprove such alteration.

OVERRULED BY: *Kalteyer v. Mitchell*, 117 S. W. 793.

In a suit upon a note and deed of trust the defendant in a plea of *non est factum* admitted the execution of the deed, but alleged a material alteration held that the following charge was proper: "You are instructed that the burden of proof is upon plaintiff to establish by a preponderance of the testimony that the pen interlineations in the deed of trust introduced in evidence were made before the said deed of trust was signed and acknowledged by the defendants."

NOTE

The overruling case was decided on writ of error from the Fourth District. The opinion of the Court of Civil Appeals is to be found in 110 S. W. 462. Chief Justice Gaines delivering the opinion holds that there is a conflict between certain named cases upon the question of the burden of proof. It will be seen from the cases herein-after cited that there is also a conflict as to whether a defendant in order to raise the issue of alteration and introduce evidence in support of it, must file a plea of *non est factum*. There is likewise a conflict as to whether an alteration is presumed to have been made before execution.

The principles announced by conflicting authorities are herewith given and the authorities in support of each principle.

Burden of proof is on the party offering the instrument where alteration appears upon its face, and is such as to cast suspicion upon it. *Deweese v. Bluntzer*, 70 T. 406, 7 S. W. 820; *Jacoby v. Brigman*, 7 S. W. 366; *Park v. Glover*, 23 T. 469; *Rodriguez v. Haynes*, 76 T. 225, 13 S. W. 296; *Davis v. Crawford*, 63 S. W. 384; *Bullock v. Sprawls*, 54 S. W. 657.

Where a party claiming under an alleged altered instrument has been in possession of it, it affords a presumption that the alteration was made by him, and throws upon him the burden of proving that the alteration was made with the consent of the other party. *Bowser v. Cole*, 74 T. 222, 11 S. W. 1131; *McDonald v. Nalle*, 91 S. W. 632 (41 C. A. 499); *Collins v. State*, 16 Cr. App. 274; *Davis v. State*, 5 Cr. App. 48; *Heath v. State*, 14 Cr. App. 213.

Where an alteration is not apparent on the face of the instrument, the burden of proof is on the party pleading it. *Kansas M. L. Ins.*

Co. v. Coalson, 54 S. W. 388, 5 C. A. 48; McKenzie v. Barrett, 98 S. W. 229 (43 C. A. 451); Muckleroy v. Bethany, 27 T. 551.

In the absence of a plea of *non est factum* defendant cannot object to introduction of note on account of alteration. Mattosy v. Frosh, 9 T. 612; Miller v. Alexander, 13 T. 497 (65 Am. Dec. 73); Davis v. Crawford, 53 S. W. 384; Reed v. Roark, 14 T. 330.

An answer alleging alteration is not a plea of *non est factum* which the statute requires to be verified. Kansas M. L. Ins. Co. v. Coalson, 54 S. W. 388, 5 C. A. 48; Ruiz v. Campbell, 26 S. W. 295, 6 C. A. 714; Heath v. State, 14 Cr. App. 213.

An allegation in an answer that a note sued on had been altered does not render verification necessary. Ruiz v. Campbell, 26 S. W. 295, 6 C. A. 714; Park v. Glover, 23 T. 469. In the case of Kansas M. L. Ins. Co. v. Coalson, in the first part of the opinion it is said, a plea admitting the execution, but setting up a material alteration, is not a plea of *non est factum* which our statute requires to be verified. In the latter part of the same opinion it is said, that it is the better practice to set up an alteration by plea and to verify it as in a case of *non est factum*.

The presumption that interlineations in a deed are presumed to have been made before signing does not obtain except when it is free from suspicion. Collins v. Ball, 82 T. 259 (17 S. W. 614, 27 A. S. R. 877)

Where nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the existence of the instrument. Woodward v. Suggett, 59 T. 619.

An erased or altered writing is presumed to be a false writing. Ricks v. Wofford, 31 T. 411.

In a suit upon an administrator's bond which had remained in official custody, the burden of proving an alteration is on the defendant. Peveler v. Peveler, 54 T. 53.

An alteration of a married woman's deed is presumed to have been made before the acknowledgment was taken. Houston v. Jordan, 82 T. 352 (18 S. W. 702).

As there is a hopeless conflict between the above authorities and an attempt to reconcile them will be useless, the following principles must be considered as established by the general weight of those authorities.

Where an instrument declared on shows upon its face a material alteration, but is not such as to cast suspicion upon it, the presumption obtains that the alteration was made before execution, and the plaintiff can introduce it in evidence without the necessity of showing that the alteration was lawfully made. But where the instrument offered shows upon its face an alteration, and the alteration or the general appearance of the instrument creates a suspicion

that the alteration was unlawfully made, then no presumption is indulged in its favor, and the instrument is inadmissible until the plaintiff has established that the alteration was lawfully made.

Where the material alteration is not patent upon its face and is free from suspicion, the defendant who desires to raise the issue of alteration must set it up by verified plea, and the burden is upon him to establish the truth of his plea.

See King's Conflicting Cases, Vol. 2, Sec. 37, on presumption arising from possession of altered instruments.

**§ 267. Wells-Fargo Express Co. v. Boyle, 87 S. W. 165
(39 C. A. 365).**

In an action for injuries, it was error to permit a witness not qualified as an expert to state that the plaintiff had not been able to do much since the accident, though the witness lived near the plaintiff, and had known him for a long time.

CONTRA: Houston & T. V. Ry. Co. v. Parnell, 120 S. W. 951.

In a personal injury action, nonexpert witnesses who had known plaintiff before the accident and had observed him since, could testify that he had not been able to perform physical labor since he was injured, such testimony coming within an exception to the rule excluding nonexpert opinion testimony.

NOTE.

The first case was decided by the Court of Appeals for the Fifth District. The second case was decided by the Court of Appeals for the Third District. Our courts have allowed non-expert witnesses to give their opinions after detailing the facts upon which their opinions are based in the following instances: Decedent's capacity to make a will. *Thomas v. State*, 40 T. 65; *Honey v. Clark*, 65 T. 96; *Cockrell v. Cox*, 65 T. 675; *Brown v. Mitchell*, 88 T. 361 (31 S. W. 621); *Scalf v. Collins County*, 80 T. 514, 16 S. W. 314; *Williams v. State*, 39 S. W. 687 (37 T. Cr. 348); *Missouri, K. & T. Ry. Co. v. Brantley*, 62 S. W. 94 (26 C. A. 11).

The cause of overflow of plaintiff's land. *Gulf C. & S. F. Ry. Co. v. Hepner*, 83 T. 136 (18 S. W. 441).

That the opening of a bridge was not large enough to permit passage of drift. *International & G. N. Ry. Co.*, 64 T. 293.

What caused standing water at embankment. *Gulf C. & S. F. Ry. Co. v. Richards*, 83 T. 203 (18 S. W. 611).

That an embankment caused overflow of streams. *Etheridge v. San Antonio & A. P. Ry. Co.*, 39 S. W. 204.

That spreading of track caused derailment. *Gulf C. & S. F. Ry. Co. v. John*, 29 S. W. 558 (9 C. A. 342).

Effect of freshet on gravel foundation. *Galveston H. & S. A. Ry. Co. v. Daniels*, 28 S. W. 548, 711 (9 C. A. 253).

That embankment changed flow of river. *Gulf C. & S. F. Ry. Co. v. Lockett*, 78 T. 282 (14 S. W. 611).

That a train was running at an unusual rate of speed. *Gulf C. & S. F. Ry. Co. v. Bell*, 24 C. A. 593, 58 S. W. 614.

That pneumonia was caused by extreme cold in the car. *Ft. Worth & D. C. Ry. Co. v. Hyatt*, 34 S. W. 677 (12 C. A. 435).

That a person at a certain time and place was ill. *St. Louis & S. F. Ry. Co. v. Boyer*, 97 S. W. 1070.

That the plaintiff could not after the accident lift anything. *San Antonio Traction Co. v. Flory*, 100 S. W. 200 (45 C. A. 233).

That plaintiff seemed to be suffering. *Mullin v. G. H. & S. A. Ry. Co.*, 92 S. W. 1000; *St. Louis & S. W. Ry. Co. v. Burke*, 81 S. W. 774 (36 C. A. 222).

Plaintiff's physical condition was such that he could not work. *St. Louis S. Ry. Co. v. Dempsey*, 89 S. W. 786 (40 C. A. 398).

That plaintiff did not appear to be fifty per cent as good a man as he was before the accident. *St. Louis & S. F. Ry. Co. v. Smith*, 90 S. W. 926.

Associate Justice Talbot of the Fifth District in his opinion in the last case above cited, intimates that the Wells-Fargo case is not in conflict with the cases cited in this note. While Associate Justice Key of the Third District in the contra case expressly holds that there is a conflict.

§ 268. *Western Union Tel. Co. v. Blake*, 68 S. W. 526 (29 C. A. 224).

Where one suffered mental anguish because of the failure of a telegraph company to transmit a message received in one state to be transmitted to any other, the law of the state where the message is to be delivered, governs. And mental anguish arising from such negligence can be recovered altho it is not recognized as an element of damage in the state where the message is received for transmission.

CONTRA: *Western Union Tel. Co. v. Cooper*, 69 S. W. 427 (29 C. A. 591).

Where a telegram is received for transmission in one state to be delivered in another and mental anguish is suffered by reason of delay in transmission, the law of the state where the message is received for transmission governs, and the addressee is not entitled to recover when he sues in the state where it was to be delivered if mental anguish is not recoverable as an element of damage in the other state.

NOTE.

There is a sharp conflict between the above two cases, the first by the Court of Civil Appeals for the Fourth District, holding that the law of the place where the message is to be delivered governs, while the second case, by the Court of Civil Appeals for the Second District, holds that the law of the place where the message is received for transmission governs. Neither of these cases reached the Supreme Court. The opinion by Mr. Justice Neill in the Blake case, is the more logical and is sustained by the general principle, that in the construction and interpretation of a contract the law of the place where it is made governs. That in enforcing the contract and recovering for its breach the law of the place of performance, governs. Nevertheless, the Texas courts have refused to follow the Blake case but have uniformly followed the Cooper case, as will be seen by reference to the following authorities:

Western Union Tel. Co. v. Waller, 96 Tex. 589 (74 S. W. 751), by the Supreme Court; where a message is delivered to the company in Texas for transmission to the Indian Territory damages for mental anguish may be recovered in Texas tho not recoverable in the Indian Territory, citing the Cooper case.

Thomas v. Western Union Tel. Co., 61 S. W. 501 (25 C. A. 398), by the Court of Civil Appeals for the Fourth District, plaintiff, a citizen of Texas delivered a message to defendant company in Arkansas to be delivered at another point in Arkansas, held plaintiff can not, on account of delay in transmission, recover for mental anguish suffered in Texas, because same is not recognized as an element of damage by the law of Arkansas.

Western Union Tel. Co. v. Buchanan, 80 S. W. 561 (35 C. A. 437), by Court of Civil Appeals for the Fifth District, writ of error denied by the Supreme Court, a message was delivered to the defendant in Arkansas to be delivered to plaintiff in Texas, held in a suit for mental anguish caused by delay, plaintiff could not recover because contrary to the laws of Arkansas.

Western Union Tel. Co. v. Shaw, 77 S. W. 433 (33 C. A. 395), by the Court of Civil Appeals for the Third District, a message

was delivered to defendant company at a point in Texas to be delivered to plaintiff at a point in the Indian Territory, in a suit for mental anguish caused by delay held plaintiff entitled to recover under the laws of Texas and followed the Waller case.

Western Union Tel. Co. v. Anderson, 78 S. W. 34 (34 C. A. 14), by the Court of Civil Appeals for the third district writ of error denied by the Supreme Court. A telegraph company in Texas is liable in damages for mental suffering resulting from delay in delivering a message to a non-resident altho in that state mental anguish is not an element of damage.

Western Union Tel. Co. v. Christensen, 78 S. W. 744 (C. A.), by the Court of Civil Appeals for the Fifth District, in an action for mental anguish caused by delay in delivery of a message sent from a point in Louisiana to a point in Texas, the law of Louisiana prevails.

Western Union Tel. Co. v. Sloss, 100 S. W. 354 (45 C. A. 153), by the Court of Civil Appeals for the Third District, writ of error denied by the Supreme Court, message was delivered to defendant company in Arizona to be delivered to plaintiff at a point in Texas, held in a suit for mental anguish caused by delay, that plaintiff was entitled to recover as the defendant company failed to allege and prove that the laws of Arizona did not authorize a recovery and followed the Waller and Cooper cases.

Ligon v. Western Union Tel Co., 102 S. W. 429 (46 C. A. 408), by the Court of Civil Appeals for the First District, a message was received by the company at a point in Missouri to be delivered to plaintiff at a point in Texas, in a suit for mental anguish caused by delay, held the laws of Missouri govern in determining the right of plaintiff to recover, and approved the Waller, Buchanan and Cooper cases.

Western Union Tel. Co. v. Garrett, 102 S. W. 456 (46 C. A. 430), by the Court of Civil Appeals for the Third District, message delivered to company in Missouri to be transmitted to plaintiff in Texas, in a suit for mental anguish caused by delay, held that the laws of Missouri governed and followed the Waller case.

Western Union Tel. Co. v. Parsley, 121 S. W. 226, the law of the State from which a telegram is sent to the addressee in another state, determines whether the addressee may recover for mental anguish for delay in delivery, citing the Waller, Cooper, Garrett, Buchanan and Ligon cases.

Western Union Tel. Co. v. Preston, 54 S. W. 650, in a suit for mental anguish caused by delay in delivering a message, when it was agreed by the parties that the law of Arkansas should govern, no recovery could be had.

The following states follow the Texas rule and allow recovery

for mental anguish alone, Alabama, Iowa, Kentucky, Louisiana, North Carolina, South Carolina and Tennessee, in the other states damages for mental anguish alone unaccompanied by malice or direct pecuniary loss can not be recovered. The Federal Courts likewise decline to follow the Texas rule. There are numerous conflicts in the decisions as to when the company is charged with notice of relationship in death messages, Vol. 2, King's Conflicting Cases, Secs. 521, 522, 523, and what damages are recoverable, Vol. 1, King's Conflicting Cases, Secs. 221, 224 and 225.

Since the above was written the case of *Western Union Co. v. Young*, 133 S. W. 512 (C. A.), follows the rule that the law of the forwarding state governs.

In *Western Union Co. v. Douglas*, 133 S. W. 877 (T.), the principle was applied as follows: A telegram was sent from Alabama to Texas, the contract stipulated for notice of damage within sixty days. Held that that time being sufficient under the Alabama statutes. The Texas statute deeming stipulations for less than ninety days invalid, had no application. And to the same effect is *W. U. Tel. Co. v. Ashley*, 137 S. W. 1165 (C. A.), holding that it is the law of the sending state which must govern.

§ 269. *Western Union Telegraph Co. v. Cooper*, 71 T. 507 (9 S. W. 598; 1 L. R. A. 728, 10 A. S. R. 772 n).

A husband cannot recover for mental sufferings caused him by witnessing his wife suffer from injuries caused her by the defendant, his distress is merely a reflection of her distress, and to allow him damages for the same injuries would be to allow double recoveries upon the same cause of action.

CONTRA: *Gulf, C. & S. F. Tel. Co. v. Richardson*, 79 T. 649 (15 S. W. 689).

Where a close bond of relationship is known to exist between parties, a father may recover mental anguish caused by an injury to the child. The fact that the child might have also had a cause of action makes no difference, the father in such case would be recovering for his own injuries.

NOTE.

In *Gulf, C. & S. F. Ry. Co. v. Coopwood*, 96 S. W. 102 (C. A.), the conflict above is noted, and Talbot, J., declares that the Cooper case

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is overruled upon this point. The Supreme Court denied a writ of error in the Coopwood case.

See also *M., K. & T. Ry. Co. v. Lightfoot*, 106 S. W. 395 (48 C. A. 120), writ of error denied by the Supreme Court; *G. C. & S. F. Ry. Co. v. Overton*, 107 S. W. 71 (C. A.). The Supreme Court granted a writ of error in the Overton case and held:

"There can be no recovery for such mental suffering as merely results from sympathy for another's mental or physical pain, the right of action in such cases being restricted to the person who has directly sustained the injury."

Citing *Watson on Damages & Personal Injuries*, Sec. 406, and *Western U. Tel. Co. v. Cooper*, 71 T. 512 (9 S. W. 598). The court, however, proceeds to say that there are "numerous exceptions" to the rule, and decides that the Overton case did not come within the exceptions and that Mrs. Overton was not entitled to recover for her mental distress. It will be observed that the Coopwood and Overton cases arose out of the same facts, to-wit: Mrs. Coopwood and her daughter, Mrs. Overton and another unmarried daughter, Miss Minnie Coopwood, were all on their way to San Angelo. Miss Minnie was quite sick, and it was alleged that the railway company was negligent in caring for her, etc. The contract of carriage was made by Mrs. Coopwood. The court seems to place the distinction between the Coopwood and Overton cases upon that fact, viz.: The conduct of the railway company in neglecting Miss Coopwood was a violation of the contract of carriage made with Mrs. Coopwood. It is true, Mrs. Overton was Miss Coopwood's sister, and suffered mental distress at the neglect shown to Miss Coopwood, but there was no contractual relationship between the railway company and Mrs. Overton concerning the carriage of Miss Coopwood. *G. C. & S. F. Ry. Co. v. Overton*, 101 T. 583 (110 S. W. 736, 19 L. R. A. (N. S.) 500 n). What the "numerous exceptions" mentioned by the Supreme Court, are, is not stated by the Supreme Court. The only exception shown is, where a contractual relationship exists with the defendant and the plaintiff concerning a third party, whose close relationship to the plaintiff is known to the defendant, and who accordingly might reasonably be expected to suffer mentally, by reason of any injury inflicted upon the third party by defendant's breach of contract. Otherwise, the doctrine announced in the Cooper case seems to be reaffirmed. See *Street on Personal Injuries*, 659.

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§ 270. Western Union Telegraph Co. v. Ferguson, 27 S. W. 1048.

Where by contract a person binds himself to give notice in writing of any damage claimed, within a fixed time, the filing of suit and the service of citation within the time stipulated is not a compliance with the contract.

CONTRA: Phillips v. Western Union Telegraph Co., 69 S. W. 63 (95 T. 638).

See Sec. 272, W. U. Tel. Co. v. McKinney.

NOTE.

See Sec. 272, W. U. Tel. Co. v. McKinney.

**§ 271. Western Union Telegraph Co. v. Hays, 63 S. W. 171
(2 C. A. 206).**

Where by contract a person binds himself to give notice in writing of any damage claimed, within a fixed time, the filing of suit and the service of citation within the time stipulated is not a compliance with the contract.

CONTRA: Phillips v. Western Union Telegraph Co., 69 S. W. 63 (95 T. 638).

NOTE.

See Sec. 272, W. U. Tel. Co. v. McKinney.

**§ 272. Western Union Telegraph Co. v. McKinney,
2 W. & W. 462.**

Where by contract a person binds himself to give notice in writing of any damages claimed within a fixed time, the filing of suit and the service of citation within the time stipulated is not a compliance with the contract. (It is stated, however, that it would be compliance provided another suit was brought or possibly if an amendment was filed).

CONTRA: (Overruled) *Philips v Western Union Tel. Co.* 69 S. W. 63 (95 T. 638).

The sender of a telegram having agreed that the company should "not be liable for damages in any case where the claim is not presented in writing within ninety days," etc., this was complied with by filing suit and having citation served within such time.

NOTE.

The McKinney case was followed by *Western Union Telegraph Co. v. Hays*, 63 S. W. 171 (2 C. A. 206), and *Western Union Telegraph Co. v. Ferguson*, 27 S. W. 1048 (C. A.), while the following cases announced the contrary doctrine, viz.: *Western Union Telegraph Co. v. Karr*, 24 S. W. 302 (5 C. A. 61), and *Western Union Telegraph Co. v. Prince*, 29 S. W. 66 (9 C. A. 154) (writ of error refused by the Supreme Court). This sharp conflict caused the Court of Civil Appeals to certify the question to the Supreme Court and in *Phillips v. Western Union Telegraph Co.*, 69 S. W. 63 (95 T. 638), that Court decided that a suit within the contract time and service of citation within the contract time was a compliance with the contract requiring notice in writing of the claim for damages. The Supreme Court also cites the case of *Western Union Telegraph Co. v. Jobe*, 25 S. W. 1036 (6 C. A. 403), as being in this conflict, it is not believed, however, that the point was involved in that case. The reference is here given in order that the reader may examine the case for himself.

The Phillips case is followed by *Houston & T. C. Ry. Co. v. Davis*, 109 S. W. 423 (50 C. A. 74). Attention is called to a contrary ruling of the Supreme Court in a very analogous case, viz: *Mutual Life Insurance Co. v. Ford*, 131 S. W. 406. The Revised Statutes of 1895, art. 3071, imposes a penalty by way of damages and attorneys' fees for failure of an insurance company to pay a policy within a specified time after demand. Now, the Supreme Court holds in this case, that when an insurance company refuses to pay a policy after proof of loss, and thereupon the plaintiff at once filed a suit on the policy claiming the penalties and attorneys' fees, that such suit was not a sufficient demand under the statutes. It will be observed that this is not a contract, but a highly penal statute and the court lays stress upon that fact in its opinion. It will be well therefore to bear this distinction in mind.

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§ 273. **Western Union Co. v. Vanway, 54 S. W. 414 (C. A.).**

Under Revised Statutes—art. 3379, providing that any stipulation in a contract, fixing the time within which notice shall be given as a precedent to suit, at a less period than 90 days shall be void, held that a stipulation requiring notice within 90 days is valid.

CONTRA: **St. Louis & S. W. Ry. Co. v. Brass, 133 S. W. 1075 (C. A.).**

The decision in *Western Union Co. v. Vanway*, is error, as any stipulation for notice *within* 90 days is less than 90 days and therefore contrary to the statute.

NOTE.

The decisions in the two cases above are by the same Court of Civil Appeals. The reasoning of the later case seems superior. It refers to the older case of *Burgess v. Western Union Tel. Co.*, 92 T. 125 (46 S. W. 795, 71 A. S. 833), as supporting its later decision. That case, however, is not upon the direct point, but simply holds that the statute is valid. *Western Union Co. v. Taber*, 127 S. W. 268 (C. A.), the court appears to follow the *Vanway* case, although the precise point was apparently not briefed or considered.

§ 274. **Wetz v. Wetz, 66 S. W. 871 (28 C. A. 140).**

Notwithstanding the fact, that the case has been tried by the court without a jury, a question of fact cannot be reviewed in the appellate court unless it has been called to the attention of the court below in a motion for a new trial.

OVERRULED: **Greer v. Featherston, 95 Tex. 654 (79 S. W. 69).**

On a trial before the court without a jury no motion for a new trial is necessary in order to authorize the appellate court to determine whether the facts support the judgment.

NOTE.

Art. 1371, Revised Statutes requires that a motion for a new trial "shall specify the grounds upon which it is founded, and no grounds other than those specified shall be heard or considered." It is very evident that the want of power to hear and consider, had reference to the trial court and not to the appellate court. The statute is general in its terms in requiring motions for new trial to be made, but is silent as to whether the motion is necessary when the trial is by the court. The Supreme Court has, however, held in the case of *Bell v. Alexander*, 22 Tex. 350 (22 Am. D. 268), that in a trial before the court a motion for a new trial is not necessary.

In the cases of *Black v. Black*, 67 S. W. 929, and *Gillette v. M., K. & T. Ry. Co.*, 68 S. W. 61, both by the Court of Appeals for the Third District, the overruled case is approved and followed. The Supreme Court granted a writ of error in the *Black* case (95 T. 629), but did not notice the question in conflict.

The Court of Civil Appeals in the overruled case and in the cases following it, appeared to rely upon the opinion of Judge Lipscomb in the case of *Foster v. Smith*, 1 Tex. 70, wherein he says:

"According to the correct rule of practice, no judgment ought to be reversed in this court on the ground that the verdict is not supported by the testimony, unless there has been a motion for a new trial in the court below, and in cases hereafter decided in the district courts, such rule will be enforced in this court."

The report of the case fails to disclose whether it was a trial by the court or jury, hence a doubt arises as whether Judge Lipscomb intended to apply the rule announced to trials by the court. Be this, however, as it may, that case was decided long before the adoption of the revised statutes of 1879, art. 1333, providing for conclusions of law and fact in trials before the court and making exceptions thereto sufficient on appeal.

Judge Wheeler in the case of *Hart v. Ware*, 8 Tex. 115, says:

"It is the well settled law of the court that when there was no motion for a new trial the judgment will not be reversed on the ground that the verdict is not warranted by the evidence."

There is nothing in the report of the case to determine whether it was tried by the Court or jury.

The overruling case has been followed and approved by the Court of Civil Appeals for the Third District in the case of *West v. Thompson*, 106 S. W. 1134 (48 C. A. 362); *Luther v. Western U. Tel. Co.*, 60 S. W. 1026 (25 C. A. 31), by the Court of Civil Appeals

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for the First District, altho a jury case and not necessary to the decision, yet the principle announced in the overruling case is approved. The overruling case is also followed by the Court of Civil Appeals for the Third District in the case of Foote v. Heisig, 94 S. W. 363. The overruling case having been decided by the Supreme Court it may now be considered as the law that in all trials before the court, a motion for a new trial is not necessary in order for the appellate court to reverse the judgment for the want of sufficient evidence to support it. This being true there is no necessity for Rule 69, see 84 Tex. 718, which reads as follows:

"When the case is determined by the Judge without a jury, counsel, in making a motion for a new trial, shall specify succinctly the supposed errors of law or fact, or both, into which the Judge has fallen, as far as may be practicable to do so."

There are numerous conflicts on the kindred question as to what errors assigned are to be included in a motion for new trial in jury cases. See Vol. 2, King's Conflicting Cases, Secs. 8, 35, 71, 193.

§ 275. *Wilkinson v. Ward*, 135 S. W. 692 (C. A.).

An order allowing extension of time for filing statement of facts and bills of exceptions under the Act of 1899 may be entered in vacation.

CONTRA: *Hamill v. Samuels*, — T. — (133 S. W. 419).

See Sec. 44, *Couterrie v. Crespi*.

§ 276. *Williams v. Pouns*, 48 Tex. 141.

An injunction preventing a sale of property under a deed of trust given to secure notes, suspends the statute of limitations upon the notes themselves.

OVERRULED: *Davis v. Andrews*, 88 Tex. 530 (30 S. W. 432, 32 S. W. 513).

An injunction preventing a sale of property under a deed of trust given to secure notes, does not suspend the statute of limitations upon the notes themselves.

NOTE.

The case of *Blackwell v. Barnett*, 52 Tex. 326, is in accord with the *Williams* case and must be considered as overruled, see Vol. 1, *King's Conflicting Cases*, Sec. 23, where it has been overruled upon another point. In the case of *Bowen v. Kirkland*, 44 S. W. 189 (17 C. A. 346), the Court of Civil Appeals for the Fifth District, altho not necessary to the decision of the case, cites with approval the *Williams* case. While the cases in conflict are all by the Supreme Court, the *Davis* case, being the latest, must be understood as announcing the law, that though an injunction may be pending restraining the sale under the deed of trust, this does not prevent suit upon the notes to secure which the deed of trust is given, and the statute of limitation is not thereby suspended.

§ 277. *Willis v. Lyman, Sears & Co.*, 22 T. 268.

The petition in the suit is signed by Fly and Fly, attorneys, the affidavit for the writ of garnishment is signed by B. F. Fly, who does not *in the affidavit* describe himself as either agent or attorney of the plaintiffs. The court cannot know that the person who makes affidavit is one of the persons who signed the petition as attorneys for the plaintiffs; nor will the court look to the records, in the original suit, to find information which ought to be contained in the affidavit itself.

CONTRA: *Simons v. Greer*, 34 S. W. 343 (— C. A. —).

The failure of an affidavit in garnishment, made by an agent of the plaintiff, to disclose in what capacity affiant was acting, is cured by recitals in the record of the main action disclosing an agency, because the garnishment proceeding is merely auxiliary to such main suit.

NOTE.

Simons v. Greer, cites as authority for its decision, the case of *Kelly v. Gibbs*, 84 T. 143 (19 S. W. 380), which on principle seems to fully sustain its position. The question, however, in the *Kelly* case was, where no evidence was offered in the garnishment suit, to prove that judgment had been had in the main suit, would the court look to the proceedings in the main suit or take judicial knowledge thereof? The court held that it would.

Simons v. Greer has been cited with approval in. Jefferies v. Smith, 73 S. W. 48 (31 C. A. 582), and in First National Bank of Morgan v. Brown, 92 S. W. 1052 (42 C. A. 584), although the point of decision in each of said cases, was whether the court would take judicial knowledge of the judgment in the main suit, and the cases are silent upon the question of looking to the whole proceedings.

§ 278. *Winstead v. Evans*, 33 S. W. 580 ().

Where a justice of the peace has actually announced his decision, and all that remains to be done is to enter it upon the record, there is a final judgment and the county court would have jurisdiction on appeal.

CONTRA: *McIver v. McIntosh*, 30 S. W. 1086 (10 C. A. 581).

The declaration by the court, or the entry upon his docket that he has reached a certain result, does not constitute a final judgment and the county court would not have jurisdiction on appeal.

NOTE.

In the *Winstead* case, the controversy arose as follows; plaintiff sued defendant in a justice's court, and defendant pleaded a counter claim, upon the trial the justice announced his decision and entered of record the verdict "Judgment for defendant for costs." Plaintiff appealed to the County Court, and there upon motion of defendant his appeal was dismissed for want of a final judgment. Plaintiff then filed in the Justice Court his motion for a new trial and also to amend the judgment sufficiently to make it final. The justice refused to grant a new trial or to amend his judgment, stating that the judgment was final, that he did not think that either plaintiff or defendant should recover anything but that the costs should be paid by the plaintiff but he did not enter anything further of record. Plaintiff then filed a suit against the justice in the District Court asking for a writ of mandamus to compel the justice to enter a final judgment. This was granted and defendant (Justice of the Peace), appealed. The Court of Appeals reversed the case in an oral opinion (not preserved). On motion for rehearing, which was refused, the majority of the Court, Stephens, J., writing the opinion, held directly that as a final judgment had in fact been rendered and nothing remained except to record it, the County Court

acquired jurisdiction on appeal and the District Court had no jurisdiction to issue the writ of mandamus.

Hunter, J., dissented in a very strong opinion, and called attention to the statutes which read as follows:

Art. 1612. "When the case has been tried by the Justice without a jury, he shall announce his decision in open court, and note the same in his docket, and shall proceed to render judgment thereon."

Art. 1613. "The judgment shall be recorded at length in the Justice's docket, and shall be signed by such justice. It shall clearly state the determination of the rights of the parties in the subject matter of controversy, and the party who shall pay the costs, and shall direct the issuance of such process as may be necessary to carry the judgment into execution."

Justice Hunter argues that the matter noted upon the docket was not the judgment required to be entered by Art. 1613, but was merely the "decision" required to be noted on the docket by Art. 1612, and that if the County Court had jurisdiction on appeal immediately after a justice should note his decision upon the docket then the justice would no longer have any authority to enter the judgment "at length," because as soon as the County Court's appellate jurisdiction attaches the Justice Court loses all jurisdiction over the case.

In the McIver case, the question was as follows: The Justice announced his decision, and then at a later day in the term he entered his judgment upon the record, an appeal was taken, and while the appeal bond was given within ten days from the recording of the judgment, it was more than ten days from the announcing of the decision. The court held (Justice Fisher writing the opinion) that the appeal bond was filed in time, that the announcing of the "decision" by the Justice or the entering it upon the record, does not constitute a final judgment and hence that the appeal bond was filed in time.

In *S. A. & A. P. Ry. Co. v. Thigpen*, 57 S. W. 66, Justice James writing the opinion, note is made of the decision in the McIver case that the date of the recording of the judgment and not the date the decision is announced determines the time of appeal, but refuses to express an opinion upon the point, and proceeds to distinguish the facts in the Thigpen case from the facts in the McIver case, holding that the entry of the verdict in the Thigpen case was sufficiently full to be termed a final judgment without further entry.

In the case of *Rains v. Reasonover*, 102 S. W. 176 (46 C. A. 290) the conflict on this point is noted, but again the court refuses to express

its opinion upon the matter, holding that the entry of the verdict in that case although informal, was sufficient to be termed a final judgment. In this case reference is made to the earlier case of *Young v. Pfeiffer*, 30 S. W. 94, as supporting the doctrine announced in the *McIver* case. An examination of this case, however, shows that it bears upon the question only indirectly, and is in reality authority for the proposition that the Justice Court has clearly the power to enter a judgment at a subsequent term correcting a defective judgment entered at a former term in order to make it final.

The *Winstead* case is cited in *Kyle v. Richardson*, 71 S. W. 400 (31 C. A. 101), more, however, upon the point that a suit by injunction in the District Court can not be substituted for the remedy of appeal or certiorari to the County Court, given by the Statutes. It should, however, be examined.

As throwing some light upon this subject although not directly in point, see *Roberts v. Connellee*, 8 S. W. 626 (71 T. 11), also *King's Conflicting Cases*, Vol. 11, sec. 74.

§ 279. *Wisegarver v. Yinger*, 122 S. W. 925 (C. A.).

Under Revised Statutes 1895, Art. 2284, requiring the officer before whom depositions are taken to certify on the envelope inclosing the depositions that he in person deposited the same in the mail for transmission, etc., and article 3507, providing that every notary public shall authenticate his official acts with his seal of office, the certificate of a notary on the envelope inclosing depositions must be authenticated by his official seal, otherwise the same will be suppressed.

CONTRA: *Texas & P. Ry. Co. v. Mosley*, — T. — (124 S. W. 90).

The omission of a notary's seal from his certificate on an envelope enclosing a deposition is not ground for suppressing the depositions, where the seal was attached to his certificate that the answers were signed and sworn to before him.

NOTE.

While the motion for rehearing in the *Wisegarver* case was pending, the Supreme Court decided the *Mosley* case, in effect overruling

the Wisegarver case, although not mentioning it. After the opinion by the Supreme Court was rendered a motion for a rehearing was granted in the Wisegarver case and the Court changed its opinion and followed the opinion of the Supreme Court.

It is not the purpose of this work to include cases where the conflict has been removed on rehearing, but this case is included owing to the fact that the opinion on rehearing was not rendered until long after the original opinion was rendered and for that reason there is a probability of some of the profession being misled by the erroneous principle announced in the original case, not knowing that the opinion had been changed on rehearing.

The Supreme Court in the case of *Hartford Fire Ins. Co. v. Becton* (T.), (125 S. W. 883), announces the same principle as in its previous opinion in the *Mosely* case, altho it does not mention it, yet the *Wisegarver* case is mentioned but the principle therein announced is not sustained.

§ 280. Wood Mowing & Reaping Machine Co. v. Edwards, 29 S. W. 418 (9 C. A. 537).

Where a non-resident garnishee files an answer in the county wherein he does not reside, he submits himself to the jurisdiction of the court for all purposes, and is not entitled to have the contest of his answer tried in the county of his residence.

LIMITED: *American Surety Co. v. Bernstein*, 101 T. 189 (105 S. W. 990).

The decision in the case of *Wood v. Edwards*, above cited, as well as the decisions in the *Gray Ranch Co. v. Pemberton*, 57 S. W. 71, 23 C. A. 418; and *Gerhardt Hardware Co. v. Texas Cotton Press Co.*, 26 S. W. 168, were made in cases where the answers were adjudged insufficient, and in which judgments were rendered against the garnishee for want of sufficient answers, and are not authority for the full proposition announced, that is by answering the garnishee waives his right to have a contest of his answer tried in the county in which he resides. Where the answer is not adjudged insufficient but the question arises upon a contest of said answer the privilege of having same tried in the county of his resi-

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dence is not waived, and the proper practice is for the plaintiff to file in the proper court of garnishee's residence county copies of the proceedings, including judgment, answer of garnishee and controverting affidavit, the cause is then docketed, papers filed and notice issued and served upon the garnishee after which an issue is formed under the direction of the court.

NOTE.

American Surety Co. v. Allen, 101 T. 197 (105 S. W. 992); and *American Surety Co. v. Hockwald*, 101 T. 197 (105 S. W. 992), follow the *Bernstein* decision.

§ 281. *Wright v. Howe*, 24 S. W. 314 (C. A.).

It is provided by Statute in Texas (Sayles Civ. Stat., Art. 320), that railway companies and other public carriers shall not limit or restrict their liability as it exists at common law, held, that the statute applies only to shipments beginning and ending in Texas, and not to shipments beginning, but to be concluded in another State.

CONTRA: *Armstrong v. Galveston, H. & S. A. Ry. Co.*, 92 T. 117, 46 S. W. 33).

See Sec. 153, *M. P. Ry. Co. v. Sherwood*.

§ 282. *Wright v. Macdonnell*, 27 S. W. 1024.

Where a tenant with the right to remove fixtures erected by him accepts a new lease without reservation of such right, and not in extension of the old lease, the right to remove the fixtures is lost.

DOUBTED: *Hertzberg v. Witte*, 54 S. W. 921 (22 C. A. 320).

The principle that where a tenant with the right to remove fixtures erected by him accepts a new lease without reservation of such right, and not in extension of the old lease, the

right to remove the fixtures is lost, while supported by the great weight of authority appears to be doubted by the Supreme Court.

NOTE.

Both the Wright and Hertzberg cases were by the Court of Appeals for the Fourth District, Mr. Justice Neill delivering the opinions. The case of Wright v. Macdonnell went to the Supreme Court on writ of error, 88 T. 140, and that Court reversed the case upon the ground that the principle announced was not applicable to the facts in issue, but Chief Justice Gaines uses this language:

"According to the weight of authority, when a new contract is entered into between the landlord and his tenant, which neither merely renews nor extends the former lease but which creates a new lease, and in which the right to the fixtures annexed during the first lease is not reserved, the tenant loses his privilege of removal. Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, and authorities there cited. The ruling proceeds upon the theory that the tenant, by leasing of the landlord the demised premises, without excepting the fixtures, leases the fixtures, and thereby acknowledges the title of the landlord, and is estopped to deny it. A tenant making a new lease in lieu of a former one, may, as a part of the consideration proceeding from him, expressly or impliedly stipulate that fixtures theretofore or thereafter placed by him upon the land, shall, at the end of the term, become the property of the landlord. Where such is the proper construction of the contract, it is proper to hold that the tenant has surrendered his right to remove. But whether it ought, as an original proposition, to have been held, that the mere taking of a new lease without mention of the fixtures has such an effect, may be greatly doubted."

Associate Justice Neill in the Hertzberg case notes the doubting opinion by Judge Gaines but seems to adhere to his former opinion for he says:

"The rule quoted was announced and sought to be applied by this Court in Wright v. Macdonnell but upon a writ of error to the Supreme Court it was held inapplicable to the facts in that case. The Court, however, while recognizing the support of the principle by the weight of authority, expressed grave doubt of its soundness, as an original proposition and showed a decided leaning towards Kerr v. Kingsberry, 39 Mich. 150, in which an opinion adverse to the rule is announced. As the rule that the lessee loses his right to remove his fixtures by

renewing his lease without reserving the fixtures on the premises has come down to us from the Year Books (2 Smith Lead. Cases, Supra note), one of the great sources of the common law, undisturbed until questioned in *Kerr v. Kingsberry*, and passed the opinion of the great Judge in that case with increased force and strength, it is not for us, upon an intimation of its disapproval by the Supreme Court of this State to give it question."

By an examination of the three opinions it will be readily seen that while the Supreme Court doubts the principle announced in the *Wright* case it does not directly hold to the contrary. Therefore, the question must still be considered open for future determination.

§ 283. *Witt v. Kaufman*, 25 T. Sup. 384.

Where a judgment in justice court for over \$20 is void for want of service, the defendant has the right to enjoin the execution for its collection.

CONTRA: *Galveston, H. & S. A. Ry. Co. v. Ware*, 74 T. 47 (11 S. W. 918).

Where a void judgment in justice court is for over \$20.00, defendant not entitled to an injunction as he has a legal remedy by certiorari.

NOTE.

Both of the above cases are by the Supreme Court.

In the case of the *Texas Mexican Ry. Co. v. Wright*, 29 S. W. 1134, by the Court of Civil Appeals for the Fourth District, it is held: Where a void judgment can be reviewed by certiorari, injunction will not lie to restrain the levy of an execution thereon, and in this case the conflict between the above cases is recognized. The *Texas-Mexican* case was reviewed by the Supreme Court in 88 T. 346 (31 S. W. 613), and judgment affirmed.

The same question arose in *Gulf, C. & S. F. Ry. Co. v. Rawlins*, 80 T. 579 (16 S. W. 430), and the Supreme Court there held in accord with the overruling case.

The following cases also hold in accord with the overruling case and contrary to the *Witt* case: *Houston & E. W. Ry. Co. v. Ellisor*, 37 S. W. 972 (14 C. A. 706); *Scales v. Gulf, C. & S. F. Ry. Co.*, 35 S. W. 205; *Hamblin v. Knight*, 81 T. 353 (16 S. W. 1082); *Hockwald v. American S. Co.*, 102 S. W. 181; *Anderson v. Zorn*, 131 S. W. 835.

The case of *Edrington v. Allsbrooks*, 21 T. 186, is in accord with the Witt case and must be considered as overruled.

From the weight of authority as determined from an examination of the above cases it is held. Where a judgment rendered in the Justice Court for an amount less than \$20.00 and the judgment so rendered is void for the want of service or for any other cause, and as the judgment defendant cannot have a review either by appeal or certiorari, then the judgment will be enjoined. On the other hand if the judgment complained of is over \$20.00, then it will not be enjoined, for the defendant has an adequate legal remedy by appeal or certiorari. In some of the cases, however, it is strongly intimated that if the judgment was for over \$20.00 and defendant had no knowledge of its rendition, and the time for perfecting an appeal or suing out a certiorari had expired then the judgment would be enjoined.

§ 284. *Yoacham v. McCurdy*, 65 S. W. 213 (27 C. A. 183).

A charge to the jury "that the lines and courses of a survey as originally run and marked include a greater or less quantity of land becomes wholly immaterial farther than as a circumstance to be considered as an aid in following the foot steps of a surveyor," is erroneous.

CONTRA: *Branch v. Simons*, 48 S. W. 40 (— C. A. —).

On an issue involving the location of a certain boundary line, it was proper to charge that the jury should not consider any excess in the quantity of land in the survey in question, unless it would assist them in determining the original location of such disputed line.

NOTE.

The first case is by the Court of Civil Appeals for the Second District, in which application for a writ of error was dismissed by the Supreme Court for want of jurisdiction, thereafter a motion was made to certify upon the grounds that there was a conflict between the above named decisions, which motion being overruled, the Supreme Court granted a mandamus, 95 T. 246 (66 S. W. 664), wherein it was held that there was a well defined conflict between the two cases. The Court of Appeals in obedience to the mandamus certified the question to the Supreme Court, 95 T. 336 (67 S. W.

316), wherein the Supreme Court held that the charge as given in the Yoacham case was erroneous, and approved as a correct charge the one given in the Branch case, and in further support of its ruling says:

"It is well-settled law in this State that the fact that the lines of a survey of a portion of the public domain made by the official surveyor for the purposes of a grant embrace more land than it purports to convey, or that the distances called for may fall short of those of the lines as actually run, neither destroys nor diminishes the grant. Hence if, in a case involving the question of the boundary of a survey, the undisputed evidence should show the true location of certain lines, and such lines should include more land than is called for in the survey we are clearly of the opinion that it would not be erroneous for the court to charge the jury that the lines as actually run should be taken as the true boundary lines of the survey, and that the fact that there was an excess was wholly immaterial. But where the calls cannot be reconciled, and the evidence is conflicting, the lines as claimed by one party embracing an excess while those claimed by the other embrace none, is it error to instruct the jury, in effect, that they may consider the excess as a circumstance to aid them in determining the true boundaries of the grant, but when they have determined the grant the excess becomes wholly immaterial? We think not. The propositions that when the boundaries are ascertained the excess is immaterial, and that when the evidence is doubtful as to the lines the excess may be looked to to aid the jury in determining their true location, are both correct as a matter of law, and it is not upon the weight of the evidence to so instruct the jury."

The same question arose in *Scott v. Pettigrew*, 72 T. 328 (12 S. W. 161) and *Ayres v. Harris*, 77 T. 108 (13 S. W. 768), between which the Supreme Court held (95 T. 246) there was a conflict, however, the same court in the same case on certified question held (95 T. 336) them not to be in conflict.

The general rule is, that calls in a grant in reference to their dignity and control, are ranked in the following order: 1st: Calls for natural objects; 2nd: Calls for artificial objects; 3rd: Calls for course and distance; 4th: Calls for quantity. Yet this order will not be maintained where the surrounding facts and circumstances adduced in proof show that a call lower in dignity is more certain and reliable and nearer in harmony with the balance of the calls. The Supreme Court in holding with the Branch case and in overruling the Yoacham case in effect, applies the above

rule when holding that it is proper to charge the jury that they may consider quantity (altho least in dignity) in determining the issue, when done in such manner as not to give it undue weight and importance.

§ 285. Young v. State Bank, 117 S. W. 476.

A stipulation in a note for recovery of ten per cent. attorney's fees if the note is placed in the hands of an attorney for collection, or suit is brought thereon, amounts to a contract of indemnity; and the holder of the note, to recover attorney's fees, must allege and prove the contract price of the attorney's services, or, in the absence of a contract, the reasonable value thereof.

OVERRULED: First National Bank v. Robinson, 135 S. W. 372 (— T. —).

In a suit upon a note stipulating on default to pay "all costs necessary for collection including ten per cent. for attorney's fees," it is not error to render judgment therefor in the absence of testimony that plaintiff contracted to pay the attorney ten per cent. for his services.

NOTE.

The overruled case is by the Court of Civil Appeals for the Sixth District. The overruling case is by the Supreme Court on certified question from the Court of Civil Appeals for the Fourth District, 135 S. W. 1115.

There is no question in Texas jurisprudence that has given rise to more conflicts than the one under consideration.

In the cases of *Miller v. West Texas L. Co.*, 131 S. W. 601; *Elmore v. Rugely*, 107 S. W. 151 (48 C. A. 456); *Reed v. Taylor*, 129 S. W. 764; *Young v. Bank*, 117 S. W. 476; *Garza v. Jesse Piano Co.*, 126 S. W. 906; *Texas L. & L. Co. v. Robertson*, 85 S. W. 1020 (38 C. A. 521); *First Bank v. Campbell*, 114 S. W. 887; *Hassell v. Steinman*, 132 S. W. 948 (C. A.); *Koppe v. Grogwinsky*, 132 S. W. 985 (C. A.); *McIlhenny v. Planters Bank*, 46 S. W. 282; it is held that plaintiff is not entitled to recover in the absence of showing that he has paid or contracted to pay the stipulated attorney's fees, and that the same is reasonable.

In *Lanier v. Jones* (Sup. Ct.), 135 S. W. 255, and *Carver v. Mayfield L. Co.*, 68 S. W. 711; *Frantz v. Masterson*, 133 S. W. 740 (C. A.), (29 C. A. 434), it is held. that it is not necessary for the plaintiff to prove that the amount of stipulated attorney's fees are reasonable.

In *Bolton v. Gifford*, 100 S. W. 210 (45 C. A. 140); *Tomlinson v. Drought*, 127 S. W. 263 (C. A.); *Bank v. Robinson*, 135 S. W. 1115 (C. A.); *Dashfield v. Moody*, 97 S. W. 843; *Ellis v. National City Bank*, 94 S. W. 437 (42 C. A. 83); it is held, stipulation of ten per cent. attorney's fees make a *prima facie* case in the absence of allegation and proof by defendant that the same is unreasonable.

In *Dunnivant v. Stafford*, 81 S. W. 101 (36 C. A. 33); *Frantz v. Masterson*, 133 S. W. 740 (C. A.); *Robertson v. Holman*, 81 S. W. 326 (36 C. A. 31); *Mosteller v. Astin*, 129 S. W. 1136, where the holder of the note has agreed to pay the ten per cent. stipulated to his attorney, the maker can not defeat recovery on the ground that the amount is unreasonable.

In *Hammond v. Atlee*, 39 S. W. 600 (15 C. A. 267), and *Luzenburg v. Bexar B. & L. Ass'n.*, 29 S. W. 237 (9 C. A. 261), held that the holder of a note with ten per cent attorney's fees clause, who agrees to pay his attorney five per cent. can not recover against the maker the full ten per cent.

In *Sturgis Natl. Bank v. Smith*, 30 S. W. 678 (9 C. A. 540), it is held that the fact that the plaintiff obtains the services of his attorney free does not relieve the defendant from paying the stipulated attorney's fee.

In *Maddox v. Craig*, 80 T. 602 (16 S. W. 328); *Jones v. Smith*, 26 S. W. 240 (4 C. A. 353); *Smith v. Board*, 51 S. W. 520 (21 C. A. 213); *McKelligon v. State Bank*, 24 S. W. 825; *Lay v. Cardwell*, 33 S. W. 595; *Williams v. Harrison*, 65 S. W. 884 (27 C. A. 179); *Branch v. Taylor*, 89 S. W. 813 (40 C. A. 248); *Le Tulle M. Co. v. Rugely*, 98 S. W. 438; it is held: when a note stipulates for "10 per cent. attorney's fees if placed in the hands of an attorney for collection" the same must be alleged.

In *First Natl. Bank v. Campbell*, 114 S. W. 887; *Lanier v. Jones*, 136 S. W. 255; *First Natl. Bank v. Robinson*, 135 S. W. 372; *Jungbecker v. Huber*, 101 S. W. 552, 101 T. 148 (105 S. W. 487); *Elmore v. Rugely*, 107 S. W. 151 (C. A.); *Bolton v. Gifford*, 100 S. W. 210 (45 C. A. 140); *Texas L. & L. Co. v. Robertson*, 85 S. W. 1020 (38 C. A. 521); *Dunnivant v. Stafford*, 81 S. W. 101 (36 C. A. 33) and many others, it is held that the attorney's fee clause is a contract of indemnity.

In *Sturgis Natl. Bank v. Smith*, 30 S. W. 678 (9 C. A. 540); *Walker v. Tomlinson*, 98 S. W. 907 (44 C. A. 446); *Minor v. Paris Ex.*

Bank, 53 T. 559; it is held that the provision for the payment of ten per cent. attorney's fees is to be regarded as liquidated damages.

In *Roberts v. Palmore*, 41 T. 617 and *Hamilton G. & L. Co. v. Sinker*, 74 T. 51 (11 S. W. 51), stipulated attorney's fees are held to be a part of the costs.

It will be readily seen from a careful examination of the cases above cited that there are hopeless conflicts upon a number of questions involving the right to recover attorney's fees stipulated in the notes, and as none of the cases are expressly overruled the questions in conflict can only be solved by following the weight of authority which appears to establish the following principles:

1st: Where the maker of the note stipulates therein for the payment of ten per cent. attorney's fees if placed in the hands of an attorney for collection, or suit is brought thereon, the contract is one of indemnity and not for liquidated damages.

2nd: In order for plaintiff to recover he must allege that the note has been placed in the hands of an attorney for collection, and the absence of such an allegation constitutes fundamental error. But it is not necessary to allege that suit has been brought thereon.

3rd: Should the plaintiff's right to recover be contested by the defendants in the trial court, the plaintiff must allege and prove that he has paid or contracted to pay his attorney the amount stipulated, or he must allege and prove that the stipulated amount is a reasonable attorney's fee.

4th: In the absence of a contest by defendant in the trial court, the plaintiff by pleading that the note was placed in the hands of an attorney for collection and introducing the note without further evidence, has made a *prima facie* case which the appellate court will not disturb.

5th: When plaintiff makes proper allegations and supports it by proof, the defendant cannot defeat the recovery except by pleading and proving that the amount is unreasonable, unconscionable or such want of good faith as would amount to fraud.

6th: Where it is shown upon the trial that the plaintiff has paid or contracted to pay his attorney less than the stipulated amount, the contract being one of indemnity, he can only recover the amount paid or contracted to be paid, and when he receives the services of his attorney free he can recover nothing.

7th: When a note with the attorney's fee clause is presented to an administrator for allowance, or to the probate court for approval it is not necessary to prove that the holder has paid or contracted to pay his attorney the amount stipulated or that the same is reasonable.

8th: The stipulated attorney's fees not being costs, but part of the amount in controversy necessarily affects the jurisdiction.

TABLE OF CASES

**Decided by the Court of Civil Appeals and Reviewed
by the Supreme Court.**

TABLE OF CASES

Decided by the Court of Civil Appeals and Reviewed
by the Supreme Court.

The following list embraces all cases decided by written opinion in the several Courts of Civil Appeals since the close of June Term, 1901, in which a review of their opinions by the Supreme Court has been sought either by application for writ of error, certified question, or certificate of dissent, down to the close of the last session of the Supreme Court in June, 1911. For table of cases previously decided of which this is a continuation, see Vol. 11, p. 286.

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- American Natl. Bank v. Cruger, 71 S. W. 784. Writ of error refused.
- American Surety Co. v. Bernstein, 102 S. W. 181. Writ of error granted. 101 T. 197.
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- Armstrong v. National L. I. Co., 112 S. W. 327. Writ of error refused.
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- Arthur v. Ridge, 89 S. W. 15. Writ of error refused.
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- Ashe v. Fidelity M. L. Assn., 63 S. W. 944. Writ of error refused.
- Aspley v. Alcott, 99 S. W. 1133. Writ of error refused.
- Aspley v. Hawkins, 88 S. W. 289. Writ of error refused.
- Aspley v. Wheat, 99 S. W. 1135. Writ of error refused.
- Atascosa Co. v. Alderman, 91 S. W. 846. Writ of error dismissed.
- Atchison, T. & S. F. Ry. Co. v. Bivins, 136 S. W. 1180. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Classin, 134 S. W. 358. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Davidson, 127 S. W. 895. Writ of error denied.
- Atchison, T. & S. F. Ry. Co. v. Keller, 76 S. W. 801. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Madden S. Co., 103 S. W. 1193. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Nation, 92 S. W. 822. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Sowers, 99 S. W. 190. Writ of error refused.
- Atchison, T. & S. F. Ry. Co. v. Tack, 130 S. W. 596. Writ of error refused.
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- Atlanta Nat. Bank v. Four States G. Co., 135 S. W. 1135. Writ of error refused.
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- Aycock v. San Antonio B. Assn., 63 S. W. 953. Writ of error refused.

- Ayres v. Patton, 111 S. W. 1079. Writ of error refused.
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- Beaumont Pasture Co. v. Polk, 64 S. W. 58. Writ of error dismissed.
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- Duncan-Hobson Elec. Co. v. City of Coleman, 100 S. W. 1004. Writ of error refused.
- Dunihue v. Hurd, 109 S. W. 1145. Writ of error refused.
- Dunman v. Nall, 87 S. W. 177. Writ of error refused.
- Dunn & Co. v. Smith, 74 S. W. 576. Writ of error refused.
- Dunn v. State, 94 S. W. 95. Writ of error refused. 94 S. W. 101.
- Dunn v. Taylor, 94 S. W. 347. Writ of error dismissed. 107 S. W. 592. Writ of error granted. 102 T. 80.
- Dunovant's Estate v. Stafford, 81 S. W. 101. Writ of error refused.
- Dupree v. Alexander, 68 S. W. 739. Writ of error refused.
- Dupree v. State of Texas, 107 S. W. 926. Certified question. 102 T. 455.
- Dutton v. Wright, 85 S. W. 1025. Writ of error refused.
- Dyer v. Adams, 120 S. W. 946. Writ of error refused.
- Earl v. State, 76 S. W. 207. Writ of error refused.
- Earley & Clement G. Co. v. Waco, 137 S. W. 431. Writ of error refused.
- Ernest v. Glaser, 74 S. W. 605. Writ of error refused.
- East v. Houston & T. C. Ry. Co., 77 S. W. 646. Writ of error granted. 98 T. 146.
- Eastern R. Co. of New Mexico v. Littlefield, 135 S. W. 1086. Writ of error granted.
- Eastern Tex. R. R. Co. v. Scurlock, 75 S. W. 366. Writ of error granted. 97 T. 305.
- Eastham v. Hunter, 109 S. W. 237. Writ of error granted. 102 T. 145.
- Eastham v. Patty, 69 S. W. 224. Writ of error dismissed.
- Eastin v. Texas & P. Ry. Co., 89 S. W. 440. Writ of error dismissed. 99 T. 654.
- Echols v. Jacobs Merch. Co., 84 S. W. 1082. Writ of error refused.

Edelstein v. Brown, 95 S. W. 1126. Writ of error granted. 100 T. 403.

Edgar v. State, 102 S. W. 439. Writ of error refused.

Edrington v. Hermann, 74 S. W. 936. Writ of error granted. 97 T. 193.

Edwards v. Anderson, 71 S. W. 555. Writ of error refused.

Edwards v. Trinity & B. V. R. Co., 54 S. W. 334. Writ of error refused.

Elcan v. Childress, 89 S. W. 84. Writ of error refused.

Eldridge, Receiver, v. Alexander, 63 S. W. 955. Writ of error refused.

Elliott v. Elliott, 109 S. W. 215. Writ of error refused.

Elliott v. Ferguson, 97 S. W. 917. Writ of error granted. 100 T. 418.

Elliott v. Ferguson, 103 S. W. 453. Writ of error granted. 101 T. 317.

Elliott v. First State Bank, 135 S. W. 159. Writ of error refused.

Elliott v. Waites, 124 S. W. 992. Writ of error refused.

Ellis v. Birkhead, 71 S. W. 31. Writ of error refused.

Ellis v. Brooks, 102 S. W. 94. Writ of error granted. 101 T. 591.

Ellis v. Fort Bend Co., 74 S. W. 43. Writ of error refused.

Ellis, Extrx., v. Howard-Smith Co., 80 S. W. 633. Writ of error refused.

Ellis v. Kirkpatrick, 74 S. W. 57. Writ of error refused.

Ellis v. Le Bow, 71 S. W. 31. Writ of error granted. 96 T. 532.

Ellis v. Lehman, 106 S. W. 453. Writ of error refused.

Ellis v. Light, 73 S. W. 551. Writ of error refused.

Ellis v. Littlefield, 93 S. W. 171. Writ of error refused.

Ellis v. Marshall, C. W. & F. Co., 95 S. W. 685. Writ of error refused.

Ellis v. National Exch. Bank of Dallas, 86 S. W. 776. Writ of error refused.

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El Paso & N. E. Ry. Co. v. Adkins, 120 S. W. 218. Writ of error refused.

El Paso & N. E. Ry. Co. v. Lumley, 120 S. W. 1050. Writ of error refused.

El Paso & N. E. Ry. Co. v. Sawyer, 54 C. A. 387. Writ of error refused.

El Paso & N. E. Ry. Co. v. Whatley, 85 S. W. 306. Writ of error granted. 99 T. 128.

El Paso & N. W. Ry. Co. v. McCimas, 81 S. W. 760. Writ of error refused.

El Paso & S. W. Ry. Co. v. Barrett, 101 S. W. 1025. Writ of error refused.

El Paso & S. W. Ry. Co. v. Darr, 93 S. W. 166. Writ of error refused.

- El Paso & S. W. Ry. Co. v. Eichel, 130 S. W. 922. Writ of error refused.
- El Paso & S. W. Ry. Co. v. Foth, 100 S. W. 171. Writ of error granted. 101 T. 133.
- El Paso & S. W. Ry. Co. v. Harris, 110 S. W. 145. Writ of error refused.
- El Paso & S. W. Ry. Co. v. Kelley, 83 S. W. 855. Writ of error granted. 99 T. 87.
- El Paso & S. W. Ry. Co. v. Murtle, 108 S. W. 998. Writ of error refused.
- El Paso & S. W. Ry. Co. v. O'Keefe, 110 S. W. 1002. Writ of error refused.
- El Paso & S. W. Ry. Co. v. Polk, 108 S. W. 761. Writ of error refused.
- El Paso & S. W. Ry. Co. v. Smith, 103 S. W. 988. Writ of error refused.
- El Paso & S. W. Ry. Co. v. Vizard, 88 S. W. 457. Writ of error dismissed.
- El Paso Elec. Ry. Co. v. Furber, 100 S. W. 1041. Writ of error refused.
- El Paso Elec. Ry. Co. v. Murphy, 109 S. W. 489. Writ of error refused.
- El Paso Elec. Ry. Co. v. Ruckman, 107 S. W. 1158. Writ of error refused.
- El Paso N. E. Ry. Co. v. Ryan, 81 S. W. 563. Writ of error refused.
- Emerson v. Missouri, K. & T. Ry. Co., 82 S. W. 1060. Writ of error refused.
- Emery v. League, 72 S. W. 603. Writ of error refused.
- English v. International & G. N. Ry. Co., 98 S. W. 913. Writ of error refused.
- Ennis Waterworks v. Ennis, 136 S. W. 513. Writ of error granted.
- Epperson v. Reeves, 79 S. W. 845. Writ of error refused.
- Equitable Life Assur. Soc. v. Evans, 64 S. W. 74. Writ of error refused.
- Equitable Life Assur. Co. v. Liddell, 74 S. W. 87. Writ of error refused.
- Erp v. Meacham, 130 S. W. 230. Writ of error refused.
- Eskridge v. Louisville Trust Co., 69 S. W. 987. Writ of error refused.
- Estate of M. T. Jones v. Neal, 98 S. W. 417. Writ of error refused.
- Eule v. Dorn, 92 S. W. 828. Writ of error dismissed.
- Evans v. Ashe, 108 S. W. 398, 1190. Writ of error refused.
- Evans v. Jackson, 92 S. W. 47. Writ of error refused.
- Evants v. Fuqua, 111 S. W. 675. Writ of error granted. 102 T. 430.
- Eversberg v. Supreme Tent K. of M. of M., 77 S. W. 246. Writ of error refused.

- Executors & Hrs. of Wm. Cameron, Decd., v. State of Texas*, 67 S. W. 348. Writ of error granted. 95 T. 545.
- Eyl v. State*, 84 S. W. 607. Writ of error refused.
- Faber v. Muir*, 64 S. W. 938. Writ of error refused.
- Fairbanks v. Smith*, 99 S. W. 705. Writ of error granted. 101 T. 24.
- Fall v. Nichols*, 97 S. W. 145. Writ of error refused.
- Fannigan v. St. Louis Ry. Co.*, 86 S. W. 354. Writ of error refused.
- Fant v. Jones*, 81 S. W. 338. Writ of error refused.
- Faris v. Simpson*, 69 S. W. 1029. Writ of error refused.
- Farley v. Missouri, K. & T. Ry. Co.*, 77 S. W. 1040. Writ of error refused.
- Farmer v. Cloudt*, 59 S. W. 614. Writ of error refused.
- Farmer v. Gaines*, 119 S. W. 874. Writ of error dismissed.
- Farmers C. O. Co. v. Courtney*, 134 S. W. 369. Writ of error refused.
- Farmers & M. Bank v. Bell*, 71 S. W. 570. Writ of error refused.
- Faulkner v. Cassidy*, 87 S. W. 904. Writ of error refused.
- Fayette Co. v. Krause*, 73 S. W. 51. Writ of error refused.
- Featherstone v. Brown*, 88 S. W. 470. Writ of error refused.
- Felle v. San Antonio Trac. Co.*, 107 S. W. 367. Writ of error refused.
- Fellers v. McFatter*, 101 S. W. 1065. Writ of error refused.
- Felsher v. Halinza*, 68 S. W. 838. Writ of error dismissed.
- Fenton v. Farmers Nat. Bank*, 65 S. W. 197. Writ of error refused.
- Ferguson v. Connally*, 76 S. W. 609. Writ of error refused.
- Ferguson v. Stringfellow*, 106 S. W. 762. Writ of error refused.
- Fidelity & Deposit Co. v. National Bank of Commerce*, 106 S. W. 782. Writ of error refused.
- Fidelity Co. v. Lone Oak Co.*, 80 S. W. 541. Writ of error refused.
- Fidelity Dep. Co. v. Texas Land & Mtg. Co.*, 90 S. W. 197. Writ of error refused.
- Field v. Field*, 87 S. W. 726. Writ of error refused.
- Fields v. Burnett*, 108 S. W. 1048. Writ of error refused.
- Fields v. O'Connor*, 80 S. W. 872. Writ of error refused.
- Finks v. Abeel*, 77 S. W. 650. Writ of error refused.
- Fire Assn. v. La Grange & L. C. Co.*, 109 S. W. 1134. Writ of error refused.
- First Nat. Bank v. Adams*, 72 S. W. 403. Writ of error refused.
- First Nat. Bank v. Cleland*, 82 S. W. 337. Writ of error refused.
- First Nat. Bank v. Lampasas*, 78 S. W. 42. Writ of error dismissed.
- First Nat. Bank v. Mineral W. & B. P. St. Ry.*, 133 S. W. 1099. Writ of error refused.
- First Nat. Bank v. Rowland*, 99 S. W. 1043. Writ of error refused.
- First Nat. Bank v. San Antonio Ry. Co.*, 72 S. W. 1033. Writ of error granted. 97 T. 201.
- First Nat. Bank v. Wallace*, 65 S. W. 392. Writ of error refused.
- Fisher v. Dippel*, 102 S. W. 448. Writ of error refused.

- Fisher v. Giddings, 74 S. W. 85. Writ of error granted. 97 T. 184.
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 Fisher v. Texas Tel. Co., 79 S. W. 50. Writ of error refused.
 Fitch v. Kennard, 133 S. W. 738. Writ of error refused.
 Fitzhugh v. Johnson, 133 S. W. 913. Writ of error granted.
 Flach v. Zanderson, 92 S. W. 348. Writ of error refused.
 Flack v. Breman, 101 S. W. 537. Writ of error refused.
 Flanary v. Chedgely, 77 S. W. 1034. Writ of error dismissed.
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 Fleming v. Texas Loan Agency, 58 S. W. 971. Writ of error refused.
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 Flippen v. State Life Ins. Co., 70 S. W. 787. Writ of error refused.
 Flores v. Atchison Ry. Co., 66 S. W. 709. Writ of error refused.
 Flores v. State, 85 S. W. 1029. Writ of error granted. 100 T. 433.
 Floyd v. Watkins, 79 S. W. 612. Writ of error refused.
 Foley v. Holtcamp, 66 S. W. 891. Writ of error refused.
 Foley v. Northrup, 105 S. W. 229. Writ of error refused.
 Fontaine v. Nuse, 38 S. W. 358. Writ of error refused.
 Ford v. Boone, 75 S. W. 353. Writ of error refused.
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 Fort Worth & D. C. Ry. Co. v. Alexander, 81 S. W. 1015. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Anderson, 118 S. W. 1113. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Dalley, 111 S. W. 763. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Garrison, 79 S. W. 611. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Hays, 131 S. W. 416. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Linthicum, 77 S. W. 40. Writ of error refused.
 Fort Worth & D. C. Ry. Co. v. Lloyd, 132 S. W. 899. Writ of error refused.

- Fort Worth & D. C. Ry. Co. v. Longino, 54 C. A. 87. Writ of error granted.
- Fort Worth & D. C. Ry. Co. v. Lynch, 136 S. W. 580. Writ of error dismissed.
- Fort Worth & D. C. Ry. Co. v. Masterson, 95 T. 262. Certified Question.
- Fort Worth & D. C. Ry. Co. v. McIntyre, 136 S. W. 1196. Writ of error dismissed.
- Fort Worth & D. C. Ry. Co. v. Partin, 76 S. W. 236. Writ of error refused.
- Fort Worth & D. C. Ry. Co. v. Roberts, 78 S. W. 1000. Writ of error granted. 98 T. 42.
- Fort Worth & D. C. Ry. Co. v. Smith, 87 S. W. 371. Writ of error refused.
- Fort Worth & D. C. Ry. Co. v. State, 93 S. W. 465. Writ of error granted. Dismissed.
- Fort Worth & D. C. Ry. Co. v. Waggoner Nat. Bank, 81 S. W. 1050. Writ of error refused.
- Fort Worth & D. C. Ry. Co. v. Walker, 106 S. W. 400. Writ of error refused.
- Fort Worth & D. C. Ry. Co. v. Woolridge, 108 S. W. 1159. Writ granted. 101 T. 471.
- Fort Worth & R. G. Ry. Co. v. Conner, 131 S. W. 1135. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Bailey, 138 S. W. 822. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Greer, 69 S. W. 421. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Harrold, 101 S. W. 267. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Jones, 85 S. W. 37. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Morris, 101 S. W. 1037. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. Robinson, 84 S. W. 410. Writ of error refused.
- Fort Worth & R. G. Ry. Co. v. State, 100 T. 425. Writ of error dismissed.
- Fort Worth & R. G. Ry. Co. v. Wilkinson, 110 S. W. 470.
- Fort Worth & R. H. St. Ry. Co. v. Hawes, 107 S. W. 556. Writ of error refused.
- Fort Worth v. Williams, 119 S. W. 137. Writ of error refused.
- Fort Worth Stock Yds. Co. v. Whittenberg, 78 S. W. 363. Writ of error refused.
- Forty-acre S. L. S. Co. v. West Texas B. & T. Co., 111 S. W. 417. Writ of error refused.

- Forty-acre S. L. S. Co. v. West Texas B. & T. Co., 118 S. W. 790. Writ of error refused.
- Fourth Nat. Bank v. Dallas, 73 S. W. 841. Writ of error refused.
- Fowler v. Agnew, 95 S. W. 36. Writ of error refused.
- Franklin Co. v. Huff, 95 S. W. 41. Writ of error refused.
- Franklin v. Villeneuve, 68 S. W. 203. Writ of error refused.
- Frantz v. Masterson, 133 S. W. 740. Writ of error granted.
- Frazier v. Waco B. & L. Assn., 61 S. W. 132. Writ of error refused.
- Freeman v. Cleary, 136 S. W. 521. Writ of error refused.
- Freeman v. Courtney, 134 S. W. 260. Writ of error refused.
- Freeman v. Field, 135 S. W. 1073. Writ of error dismissed.
- Freeman v. Fuller, 127 S. W. 1194. Writ of error refused.
- Freeman v. Johnson, 136 S. W. 275. Writ of error refused.
- Freeman v. Kane, 133 S. W. 723. Writ of error refused.
- Freeman v. Irving, 136 S. W. 810. Writ of error granted.
- Freeman v. Mireles, 127 S. W. 1162. Writ of error refused.
- Freeman v. Hutig Sash & D. Co., 135 S. W. 740. Writ of error granted.
- Freeman v. Nickles, 125 S. W. 941. Writ of error refused.
- Freeman v. Ortiz, 236 S. W. 113. Writ of error granted.
- Freeman v. San Antonio Brewing Assn., 85 S. W. 1165. Writ of error refused.
- Freeman v. Slay, 88 S. W. 404. Writ of error granted. 99 T. 514.
- Freeman v. Vetter, 130 S. W. 190. Writ of error refused.
- French Plano Co. v. Dallas, 61 S. W. 942. Writ of error refused.
- Frey v. Myers, 113 S. W. 592. Writ of error granted. 102 T. 527.
- Frey v. Myers, 119 S. W. 1142. Writ of error dismissed.
- Friend v. Boren, 95 S. W. 711. Writ of error refused.
- Frugla v. Trueheart, 106 S. W. 736. Writ of error refused.
- Fullenwider v. Ferguson, 70 S. W. 222. Writ of error refused.
- Fuller v. State Nat. Bank, 63 S. W. 552. Writ of error refused.
- Furneaux v. Webb, 77 S. W. 828. Writ of error refused.
- Gaar, Scott & Co. v. Burge, 110 S. W. 181. Writ of error refused.
- Gaddis v. Western U. Tel. Co., 77 S. W. 37. Writ of error refused.
- Gages v. Lowe, 127 S. W. 1178. Writ of error refused.
- Gallup v. Flood, 103 S. W. 426. Writ of error refused.
- Gallup v. Houston Oil Co., 109 S. W. 957. Writ of error refused.
- Galt v. Holder, 75 S. W. 568. Writ of error refused.
- Galveston City Ry. Co. v. Chapman, 80 S. W. 586. Writ of error refused.
- Galveston City Ry. Co. v. Hanna, 79 S. W. 639. Writ of error refused.
- Galveston H. & H. Ry. Co. v. Alberti, 103 S. W. 699. Writ of error refused.
- Galveston H. & H. Ry. Co. v. Levy, 79 S. W. 879. Writ of error refused.

- Galveston H. & H. Ry. Co. v. Scott, 79 S. W. 642. Writ of error dismissed.
- Galveston H. & H. Ry. Co. v. State, 93 S. W. 469. Writ of error granted and dismissed.
- Galveston H. & N. Ry. Co. v. Cochran, 109 S. W. 261. Writ of error refused.
- Galveston, H. & N. Ry. Co. v. Morrison, 102 S. W. 143. Writ of error refused.
- Galveston, H. & N. Ry. Co. v. Newport, 65 S. W. 657. Writ of error refused.
- Galveston, H. & N. Ry. Co. v. Wallis, 104 S. W. 418. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Abbey, 68 S. W. 293. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Alberti, 103 S. W. 699. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Allen, 94 S. W. 417. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Appel, 77 S. W. 635. Writ of error refused.
- Galveston v. Averill, 136 S. W. 98. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Baumgarten, 72 S. W. 78. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Bean, 99 S. W. 721. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Berry, 105 S. W. 1019. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Berry, 109 S. W. 393. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Bonn, 99 S. W. 413. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Brown, 77 S. W. 832. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Buck, 65 S. W. 681. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Burns, 91 S. W. 816. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Butshek, 78 S. W. 740. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Cade, 93 S. W. 124. Writ of error refused. 100 T. 37.
- Galveston, H. & S. A. Ry. Co. v. Coker, 135 S. W. 279. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Collins, 71 S. W. 560. Writ of error refused.

- Galveston, H. & S. A. Ry. Co. v. Conuteson, 111 S. W. 187. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Crier, 100 S. W. 1177. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Crow, 117 S. W. 170. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Curry, 91 S. W. 1100. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Davidson, 93 S. W. 438. Writ of error granted. 101 T. 534.
- Galveston, H. & S. A. Ry. Co. v. Davis, 65 S. W. 217. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. DeGroff, 110 S. W. 1006. Writ of error granted. 102 T. 433.
- Galveston, H. & S. A. Ry. Co. v. Everett, 67 S. W. 453. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Fales, 77 S. W. 234. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Fink, 99 S. W. 204. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, 91 S. W. 355. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Fry, 84 S. W. 664. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Garcia, 100 S. W. 198. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Garrett, 98 S. W. 932. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Gillespie, 106 S. W. 707. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Ginther, 70 S. W. 96. Writ of error granted. 96 T. 295.
- Galveston, H. & S. A. Ry. Co. v. Green, 91 S. W. 380. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Hanway, 57 S. W. 695. Writ of error dismissed. 94 T. 76.
- Galveston, H. & S. A. Ry. Co. v. Harper, 114 S. W. 1168. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Harris, 107 S. W. 108. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Heard, 91 S. W. 371. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Herring, 108 S. W. 977. Writ of error dismissed. 102 T. 100.

- Galveston, H. & S. A. Ry. Co. v. Holyfield, 91 S. W. 353. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Hubbard, 70 S. W. 112. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Janert, 107 S. W. 963. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Jenkins, 69 S. W. 233. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Jones, 68 S. W. 190. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Karner, 70 S. W. 328. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Keen, 73 S. W. 1074. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. King, 91 S. W. 622. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Laprelle, 65 S. W. 448. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Levy, 79 S. W. 879. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Lobit, 132 S. W. 102. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. McAdams, 84 S. W. 1076. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Manns, 84 S. W. 254. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Matzdorf, 107 S. W. 882. Writ of error granted. 102 T. 42.
- Galveston, H. & S. A. Ry. Co. v. Miller, 93 S. W. 177. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Mitchell, 107 S. W. 374. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Mohrmann, 93 S. W. 1090. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Morris, 60 S. W. 813. Writ of error granted. 94 T. 505.
- Galveston, H. & S. A. Ry. Co. v. Mortson, 71 S. W. 770. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Norton, 119 S. W. 702. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Parish, 45 S. W. 493. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Parvin, 64 S. W. 1008. Writ of error refused.

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- Galveston, H. & S. A. Ry. Co. v. Paschal, 92 S. W. 622. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Patillo, 101 S. W. 492. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Pendleton, 70 S. W. 996. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Perkins, 73 S. W. 1067. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Piggott, 54 C. A. 367. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Powers, 101 S. W. 250. Writ of error granted. 101 T. 161.
- Galveston, H. & S. A. Ry. Co. v. Powers, 117 S. W. 459. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Puente, 70 S. W. 362. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Quay, 66 S. W. 219. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Quinn, 100 S. W. 1036. Writ of error granted. 100 T. 613.
- Galveston, H. & S. A. Ry. Co. v. Quinn, 104 S. W. 397. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Riggs, 109 S. W. 864. Writ of error granted. 101 T. 522.
- Galveston, H. & S. A. Ry. Co. v. Roberts, 91 S. W. 375. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Roth, 84 S. W. 1112. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Schwessber, 120 S. W. 1147. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Sherwood, 67 S. W. 776. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Smith, 93 S. W. 184. Writ of error granted. 100 T. 267.
- Galveston, H. & S. A. Ry. Co. v. State, 93 S. W. 464. Writ of error granted. 100 T. 153.
- Galveston, H. & S. A. Ry. Co. v. Stevens, 94 S. W. 395. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Still, 100 S. W. 176. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Stoy, 99 S. W. 135. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Sullivan, 53 C. A. 394. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Thompson, 116 S. W. 106. Writ of error refused.

- Galveston, H. & S. A. Ry. Co. v. Tirres, 76 S. W. 806. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Udalle, 91 S. W. 330. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Volrath, 89 S. W. 279. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Wafer, 106 S. W. 897. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Walker, 106 S. W. 705. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Wallace, 117 S. W. 169. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Washington, 92 S. W. 1054. Writ of error dismissed.
- Galveston, H. & S. A. Ry. Co. v. Whisenhunt, 81 S. W. 332. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Wiseman, 136 S. W. 793. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Worcester, 100 S. W. 990. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Worth, 53 C. A. 572. Writ of error refused.
- Galveston, H. & S. A. Ry. Co. v. Young, 100 S. W. 993. Writ of error refused.
- Galveston T. Co. v. Gusti, 134 S. W. 239. Writ of error refused.
- Galveston & W. Ry. Co. v. Galveston, 74 S. W. 537. Writ of error refused.
- Galveston & W. Ry. Co. v. Kinhead, 60 S. W. 468. Writ of error refused.
- Gammell Book Co. v. Jones, 78 S. W. 21. Writ of error refused.
- Gammell S. P. Co. v. Montfort, 81 S. W. 1029. Writ of error refused.
- Gammon v. Sigel, 95 S. W. 730. Writ of error refused.
- Garcia v. Freeman, 121 S. W. 886. Writ of error refused.
- Garden v. Planters Nat. Bank, 54 C. A. 572. Writ of error refused.
- Garner v. Boyle, 79 S. W. 1066. Writ of error refused.
- Garner v. Risinger, 81 S. W. 343. Writ of error refused.
- Garrett v. Galveston, H. & S. A. R. Co., 108 S. W. 760. Writ of error refused.
- Garrett v. Spradling, 88 S. W. 293. Writ of error refused.
- Garrison v. Richards, 107 S. W. 861. Writ of error dismissed.
- Garrison v. Ochiltree County, 111 S. W. 445. Writ of error refused.
- Gartin v. Haynie, 113 S. W. 166. Writ of error refused.
- Garza v. State, 84 S. W. 1029. Writ of error granted. 100 T. 433.
- Gaston v. Cummins, 109 S. W. 476. Writ of error refused.

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- Gatlin v. Street, 90 S. W. 318. Writ of error refused.
Gefers v. Mecke, 67 S. W. 144. Writ of error refused.
George v. Hesse, 53 C. A. 344. Writ of error refused.
German Ins. Co. v. Gibbs, 92 S. W. 1068, 96 S. W. 760. Writ of error refused.
Gibbs v. Ashford, 66 S. W. 858. Writ of error refused.
Gibbs v. Dallas, 65 S. W. 81. Writ of error refused.
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Gidley v. Lovenberg, 79 S. W. 831. Writ of error refused.
Gilbert v. Edwards, 74 S. W. 959. Writ of error refused.
Gilbert v. Gossard, 73 S. W. 989. Writ of error refused.
Gilbert v. Mansfield, 85 S. W. 830. Writ of error refused.
Gildemeister v. San Antonio T. C., 135 S. W. 1097. Writ of error refused.
Gilmartin v. Kilgore, 114 S. W. 398. Writ of error refused.
Gilmer v. Beauchamp, 87 S. W. 907. Writ of error refused.
Gilmer v. Veath, 121 S. W. 545. Writ of error refused.
Gillvin v. Missouri, K. & T. Ry. Co., 94 S. W. 130. Writ of error refused.
Gipson v. Morris, 83 S. W. 226. Writ of error refused.
Gladys City O., G. & Mfg. Co. v. Right of Way O. Co., 136 S. W. 171. Writ of error granted.
Glaze v. Johnson, 65 S. W. 662. Writ of error refused.
Glenn v. Rhine, 53 C. A. 291. Writ of error refused.
Godley L. Co. v. Teagarden, 135 S. W. 1109. Writ of error granted.
Goethal v. Read, 81 S. W. 592. Writ of error refused.
Goldstein v. Cockrill, 66 S. W. 878. Writ of error refused.
Goldstein v. Susholtz, 105 S. W. 219. Writ of error refused.
Gonzales Co. v. Houston, 81 S. W. 117. Writ of error dismissed.
Goodloe v. Goodloe, 105 S. W. 533. Writ of error refused.
Goodwin v. Daniel, 93 S. W. 534. Writ of error refused.
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Gordon v. Lewis, 133 S. W. 927. Writ of error refused.
Gorham v. Dallas & S. W. Ry. Co., 106 S. W. 930. Writ of error refused.
Gorman v. Campbell, 135 S. W. 177. Writ of error refused.
Gorman v. Settegast, 98 S. W. 665. Writ of error dismissed.
Grace v. Walker, 61 S. W. 1103. Writ of error granted. 95 T. 39.
Grand Fraternity v. Melton, 111 S. W. 967. Writ of error granted. 102 T. 399.
Grand Frat. v. Mulkey, 130 S. W. 242. Writ of error refused.
Grand Lodge v. Jones, 106 S. W. 184. Writ of error dismissed.
Grand Lodge v. Schuetze, 83 S. W. 241. Writ of error refused.
Grant v. Buchanan, 81 S. W. 820. Writ of error refused.

- Great W. O. Co. v. Carpenter, 95 S. W. 57. Writ of error refused.
Graves v. Brownson, 120 S. W. 560. Writ of error refused.
Gray v. Phillips, 117 S. W. 817. Writ of error refused.
Gray v. Sovereign Camp, 106 S. W. 176. Writ of error refused.
Gray v. Tribune, 118 S. W. 808. Writ of error refused.
Grayson County Nat. Bank v. Wandelohr, 131 S. W. 1168. Writ of error granted.
Greathouse v. Martin, 91 S. W. 385. Writ of error granted. 100 T. 99.
Green v. Bennett, 110 S. W. 108. Writ of error granted.
Green v. Robertson, 70 S. W. 345. Writ of error refused.
Green v. Tate, 69 S. W. 486. Writ of error refused.
Greenberg v. Taub, 120 S. W. 556. Writ of error dismissed.
Greenlaw v. Dallas, 75 S. W. 812. Writ of error refused.
Greenway v. De Young, 79 S. W. 603. Writ of error refused.
Greer v. International S. Y. Co., 96 S. W. 79. Writ of error refused.
Greer v. Willis, 81 S. W. 1185. Writ of error refused.
Greer Co. v. State, 72 S. W. 104. Writ of error refused.
Greiner-Kelley D. Co. v. Truett, 75 S. W. 536. Writ of error granted. 97 T. 377.
Gresham v. Harcourt, 75 S. W. 808. Writ of error refused.
Griffin v. Harris, 88 S. W. 493. Writ of error refused.
Griffin v. Stone R. Bk., 80 S. W. 254. Writ of error refused.
Groesbeck Oil Co. v. Oliver, 97 S. W. 1092. Writ of error refused.
Gross v. Brewster, 78 S. W. 359. Writ of error refused.
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Guarantee S. L. & I. Co. v. Mitchell, 99 S. W. 156. Writ of error refused.
Guergin v. Boone, 77 S. W. 630. Writ of error refused.
Guffey Petroleum Co. v. Hammil, 94 S. W. 458. Writ of error refused.
Guffey Petroleum Co. v. Hooks, 106 S. W. 690. Writ of error refused.
Guffey Petroleum Co. v. Oliver, 79 S. W. 884. Writ of error refused.
Gulf, B. & G. N. Ry. Co. v. Lewis, 85 S. W. 817. Writ of error refused.
Gulf, B. & K. C. Ry. Co. v. O'Neill, 74 S. W. 960. Writ of error refused.
Gulf, B. & K. C. Ry. Co. v. Winder, 63 S. W. 1043. Writ of error refused.
Gulf, C. & S. F. R. Co. v. Adams, 121 S. W. 876. Writ of error refused.
Gulf, C. & S. F. R. Co. v. Anson, 105 S. W. 989. Writ of error granted. 101 T. 198.

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- Gulf, C. & S. F. R. Co. v. Archambolt, 94 S. W. 1108. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Boyce, 87 S. W. 395. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Brooks, 132 S. W. 95. Writ of error refused.
- Gulf, C. & S. F. Co. v. Brooks, 73 S. W. 571. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Brown, 95 S. W. 12. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Brown & W., 86 S. W. 53. Writ of error granted. 99 T. 349.
- Gulf, C. & S. F. R. Co. v. Brown, 75 S. W. 807. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Brown, 132 S. W. 95. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Bush & W. Co., 136 S. W. 102. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Carter, 71 S. W. 73. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Chenault, 72 S. W. 868. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Clay, 66 S. W. 1115. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Coleman, 112 S. W. 690. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Coopwood, 96 S. W. 102. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Cornell, 69 S. W. 980. Writ of error refused.
- Gulf, C. & S. F. Ry. Co. v. Daby, 67 S. W. 446. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Davidson, 93 S. W. 486. Writ of error granted. 101 T. 534.
- Gulf, C. & S. F. R. Co. v. Davis, 80 S. W. 253. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Dyer, 95 S. W. 12. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Elmore, 79 S. W. 891. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Farmer, 108 S. W. 729. Writ of error granted. 102 T. 235.
- Gulf, C. & S. F. R. Co. v. Garren, 72 S. W. 1028. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Garren, 84 S. W. 1096. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Gibbs, 76 S. W. 71. Writ of error refused.

- Gulf, C. & S. F. R. Co. v. Gibson, 93 S. W. 469. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Griggs, 101 S. W. 473. Writ of error granted. 101 T. 145.
- Gulf, C. & S. F. R. Co. v. Haden, 68 S. W. 530. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Harbinson, 88 S. W. 452. Writ of error granted. 99 T. 536.
- Gulf, C. & S. F. R. Co. v. Hays, 89 S. W. 29. Writ of error dismissed.
- Gulf, C. & S. F. R. Co. v. Holt, 70 S. W. 591. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Hord, 87 S. W. 848. Writ of error dismissed.
- Gulf, C. & S. F. R. Co. v. Houghton, 68 S. W. 718. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Howard, 75 S. W. 803. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Huyett, 89 S. W. 1118. Writ of error granted. 99 T. 630.
- Gulf, C. & S. F. R. Co. v. Huyett, 108 S. W. 502. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Jackson, 109 S. W. 478. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Jackson, 86 S. W. 647. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Johnson, 77 S. W. 648. Writ of error granted. 98 T. 76.
- Gulf, C. & S. F. R. Co. v. Johnson, 103 S. W. 447. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Larkin, 80 S. W. 94. Writ of error granted. 98 T. 225.
- Gulf, C. & S. F. R. Co. v. Leatherwood, 69 S. W. 119. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Lovett, 74 S. W. 570. Writ of error granted. 97 T. 436.
- Gulf, C. & S. F. R. Co. v. Luther, 90 S. W. 44. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Mangham, 69 S. W. 80. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Martin, 86 S. W. 25. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Mathews, 89 S. W. 983. Writ of error granted. 100 T. 63.
- Gulf, C. & S. F. R. Co. v. Meadows, 120 S. W. 521. Writ of error refused.

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- Gulf, C. & S. F. Co. v. Miller, 70 S. W. 25. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Miller, 79 S. W. 1109. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Minter, 93 S. W. 516. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Moore, 68 S. W. 559. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Moore, 81 S. W. 569. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Overton, 107 S. W. 71. Writ granted. 101 T. 582.
- Gulf, C. & S. F. R. Co. v. Pearce, 95 S. W. 1133. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Redeker, 100 S. W. 362. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Rogers, 82 S. W. 822. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Saint John, 88 S. W. 297. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Sandifer, 69 S. W. 461. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Sauter, 103 S. W. 201. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Shelton, 69 S. W. 653. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Smith, 83 S. W. 719. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. South W. T. & T. Co., 61 S. W. 406. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. State, 73 S. W. 429. Writ of error granted. 97 T. 74.
- Gulf, C. & S. F. R. Co. v. State, 93 S. W. 427. Writ of error dismissed.
- Gulf, C. & S. F. R. Co. v. Tallafarro, 89 S. W. 1120. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Walters, 107 S. W. 369. Writ of error dismissed.
- Gulf, C. & S. F. R. Co. v. Wells-Fargo Co., 108 S. W. 174. Writ of error granted.
- Gulf, C. & S. F. R. Co. v. Wilder, 75 S. W. 546. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Williams, 136 S. W. 527. Writ of error refused.
- Gulf, C. & S. F. R. Co. v. Willoughby, 81 S. W. 829. Writ of error refused.

- Gulf, C. & S. F. R. Co. v. Zimmerman, 86 S. W. 54. Writ of error granted. 99 T. 349.
- Gulf, W. T. & P. Ry. Co. v. Willnebert, 104 S. W. 428. Writ of error granted. 100 T. 368.
- Gulf & B. V. Ry. Co. v. Berry, 72 S. W. 1049. Writ of error refused.
- Gunnels v. Cartledge, 64 S. W. 806. Writ of error refused.
- Gutierrez v. El Paso & N. E. R. Co., 111 S. W. 1159. Writ granted. 102 T. 578.
- Gutta-Percha & R. Mfg. Co. v. Cleburne, 107 S. W. 157. Writ of error granted. 102 T. 36.
- Guy v. Edmundson, 135 S. W. 615. Writ of error refused.
- Guyer v. Snow, 90 S. W. 71. Writ of error refused.
- Hagan v. Snider, 98 S. W. 213. Writ of error refused.
- Hagler v. Ferguson, 111 S. W. 673. Writ of error granted. 102 T. 432.
- Hahl v. Edwards, 79 S. W. 829. Writ of error refused.
- Hahl v. Kellogg, 94 S. W. 389. Writ of error refused.
- Hahl v. Southland I. Assn., 116 S. W. 831. Writ of error refused.
- Hahl v. West, 129 S. W. 876. Writ of error refused.
- Hahn v. Willis, 73 S. W. 1084. Writ of error refused.
- Haight v. Turner & Pierce, 99 S. W. 196. Writ of error dismissed.
- Haines v. West, 102 S. W. 436. Writ of error granted. 101 T. 226.
- Halbert v. Jackson, 91 S. W. 1150. Writ of error refused.
- Haley v. Hall, 135 S. W. 663. Writ of error refused.
- Hall v. Carter, 77 S. W. 19. Writ of error refused.
- Hall v. Clountz, 63 S. W. 941. Writ of error refused.
- Hall v. First Nat. Bank, 115 S. W. 293. Writ of error granted. 102 T. 308.
- Hall v. Houston & T. C. Ry. Co., 125 S. W. 946. Writ of error refused.
- Hall v. Jennings, 104 S. W. 439. Writ of error refused.
- Hall v. Levy, 72 S. W. 263. Writ of error refused.
- Hall v. Miller, 110 S. W. 165. Writ of error granted. 102 T. 239.
- Hall v. Read, 66 S. W. 809. Writ of error refused.
- Hall v. Reese, 58 S. W. 974. Writ of error refused.
- Hamburger v. Settegast, 131 S. W. 639. Writ of error refused.
- Hames v. Stroud, 112 S. W. 775. Writ of error refused.
- Hamilton v. Bell, 84 S. W. 289. Writ of error refused.
- Hamilton v. Gouldy, 103 S. W. 1117. Writ of error refused.
- Hamilton v. Jones, 75 S. W. 554. Writ of error refused.
- Hammond v. Hammond, 108 S. W. 1024. Writ of error refused.
- Hampton v. Wooley, 136 S. W. 1140. Writ of error refused.
- Hanaway v. Wiseman, 88 S. W. 437. Writ of error refused.
- Hannay v. Moody, 71 S. W. 325. Writ of error refused.

- Hanrick v. Hanrick, 81 S. W. 795. Writ of error refused.
- Hapgood Shoe Co. v. First Nat. Bank, 56 S. W. 995. Writ of error refused.
- Haralson v. San Antonio Tr. Co., 53 C. A. 253. Writ refused.
- Hardcastle v. Archer, 81 S. W. 368. Writ of error refused.
- Hardin v. Hodges, 78 S. W. 217. Writ of error refused.
- Hardin v. Jones, 68 S. W. 836. Writ of error refused.
- Hardin v. St. Louis, S. W. Ry. Co., 134 S. W. 408. Writ of error dismissed.
- Harding v. Commissioners, 65 S. W. 56. Writ of error refused.
- Haring v. Shelton, 114 S. W. 389. Writ of error granted. 103 T. 10.
- Harkey v. Day, 129 S. W. 1195. Writ of error refused.
- Harkins v. Murphy, 112 S. W. 136. Writ of error dismissed.
- Harper v. Marlon Co., 77 S. W. 1044. Writ of error refused.
- Harpold v. Moss, 106 S. W. 1131. Writ of error granted. 101 T. 540.
- Harrington v. Clafin, 66 S. W. 898. Writ of error refused.
- Harris v. Bryson, 73 S. W. 548. Writ of error refused.
- Harris v. Bryson, 80 S. W. 105. Writ of error refused.
- Harris v. Harris, 109 S. W. 1138. Writ of error dismissed.
- Harris v. Houston, 60 S. W. 440. Writ of error refused.
- Harris v. Mathews, 81 S. W. 1198. Writ of error refused.
- Harris v. Rather, 134 S. W. 754. Writ of error refused.
- Harris v. Schlinke, 62 S. W. 72. Writ of error refused.
- Harrison v. Hogue, 136 S. W. 118. Writ of error refused.
- Harrold v. State, 71 S. W. 407. Writ of error refused.
- Harry v. Brady, 86 S. W. 615. Writ of error dismissed.
- Hart v. Hunter, 114 S. W. 882. Writ of error refused.
- Hart v. Meredith, 65 S. W. 507. Writ of error refused.
- Hartford F. Ins. Co. v. Houston, 110 S. W. 973. Writ of error granted. 102 T. 317.
- Hartz v. Hauser, 90 S. W. 63. Writ of error refused.
- Harvey v. Petty, 63 S. W. 893. Writ of error refused.
- Harwell v. Harbinson, 95 S. W. 30. Writ of error refused.
- Haswell v. Blake, 90 S. W. 63. Writ of error refused.
- Hatch v. Hatch, 80 S. W. 411. Writ of error refused.
- Hatchett v. Hatchett, 67 S. W. 163. Writ of error refused.
- Hatchett v. Sunset B. & T. Co., 99 S. W. 174. Writ of error dismissed.
- Hatzfield v. Walsh, 120 S. W. 525. Writ of error refused.
- Haubelt v. Hirsch, 131 S. W. 435. Writ of error refused.
- Haupt v. Cravens, 120 S. W. 541. Writ of error refused.
- Hausmann v. Trinity & B. V. Ry. Co., 82 S. W. 1052. Writ of error refused.
- Hawkins v. Potter, 130 S. W. 643. Writ of error refused.
- Hawthorn v. State, 87 S. W. 839. Writ of error refused.

- Hayes v. Groesbeck, 69 S. W. 237. Writ of error dismissed.
- Haynes v. Texas & N. O. R. Co., 111 S. W. 427. Writ of error refused.
- Haynie v. Miller, 92 S. W. 262. Writ of error refused.
- Haynes v. State, 99 S. W. 405. Writ of error granted. 100 T. 426.
- Hayward L. Co. v. Bonner, 120 S. W. 577. Writ of error refused.
- Hayward L. Co. v. Cox, 104 S. W. 405. Writ of error refused.
- Haywood v. Galveston, H. & S. A. Ry. Co., 85 S. W. 433. Writ of error refused.
- Hauworth v. Williams, 117 S. W. 1197. Certified question. 102 T. 308.
- Heard v. Thrasher, 71 S. W. 803. Writ of error granted. 96 T. 380.
- Heidlebach v. Carter, 79 S. W. 346. Writ of error refused.
- Heldrich v. Habeman, 66 S. W. 106-795. Writ of error dismissed.
- Heil v. Martin, 71 S. W. 814. Writ of error refused.
- Heilbron v. St. Louis, S. W. Ry. Co., 113 S. W. 610. Writ of error refused.
- Helsley v. Moss, 113 S. W. 599. Writ of error refused.
- Henderson Co. v. Carpenter, 98 S. W. 413. Writ of error refused.
- Henderson v. Rushing, 105 S. W. 840. Writ of error refused.
- Henning v. Wren, 75 S. W. 905. Writ of error refused.
- Henry v. Boulter, 63 S. W. 1056. Writ of error refused.
- Henry v. McNew, 69 S. W. 213. Writ of error refused.
- Henry v. Red Water L. Co., 102 S. W. 749. Writ of error refused.
- Henry v. Thomas, 74 S. W. 599. Writ of error refused.
- Henry v. Vaughan, 103 S. W. 192. Writ of error refused.
- Heona v. Arledge, 120 S. W. 508. Writ of error refused.
- Herman v. Dunman, 95 S. W. 80. Writ of error dismissed.
- Herman v. Fenn, 129 S. W. 1139. Writ of error refused.
- Hernandez v. State, 135 S. W. 170. Writ of error dismissed.
- Hernischel v. Texas Drug Co., 61 S. W. 419. Writ of error refused.
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- Herring v. Kroeger, 57 S. W. 980. Writ of error refused.
- Hettich v. Hillje, 77 S. W. 641. Writ of error refused.
- Hickey v. Collins, 90 S. W. 716. Writ of error dismissed.
- Hicks v. Galveston, H. & S. A. Ry. Co., 71 S. W. 322. Writ of error granted. 96 T. 355.
- Hicks v. Pogue, 76 S. W. 786. Writ of error refused.
- Hicks v. Stewart, 53 C. A. 401. Writ of error refused.
- Hicks v. Texas L. & I. Co., 111 S. W. 784. Writ of error refused.
- Hightower v. Gray, 83 S. W. 254. Writ of error refused.
- Hildebrandt v. Ames, 66 S. W. 126. Writ of error refused.
- Hill v. Harris, 64 S. W. 820. Writ of error refused.
- Hill v. Hoeldtke, 54 C. A. 201. Writ of error granted.

- Hill v. Houser, 115 S. W. 112. Writ of error refused.
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- Hoskins v. Daugherty, 669 S. W. 109. Writ of error refused.
- House v. Wells, 108 S. W. 196. Writ of error refused.
- Houston v. Koonce, 136 S. W. 1159. Writ of error granted.
- Houston, B. & T. R. Co. v. O'Leary, 136 S. W. 601. Writ of error refused.
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- Houston Electric Ry. Co. v. Elvis, 72 S. W. 216. Writ of error refused.
- Houston, E. & W. T. Ry. Co. v. Boone, 131 S. W. 616. Writ of error granted.
- Houston, E. & W. T. Ry. Co. v. McHale, 105 S. W. 1149. Writ of error refused.
- Houston, E. & W. T. Ry. Co. v. Ollis, 83 S. W. 850. Writ of error refused.
- Houston, E. & W. T. Ry. Co. v. Roach, 114 S. W. 418. Writ of error refused.
- Houston, E. & W. T. Ry. Co. v. Sallee, 120 S. W. 216. Writ of error dismissed.
- Houston, E. & W. T. Ry. Co. v. Skeeter Bros., 98 S. W. 1064. Writ of error dismissed.
- Houston, E. & W. T. Ry. Co. v. State, 93 S. W. 463. Writ of error granted and dismissed.
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- Houston & T. C. Ry. Co. v. Anderson, 132 S. W. 377. Writ of error refused.
- Houston & T. C. Ry. Co. v. Anglin, 86 S. W. 785. Writ of error granted. 99 T. 349.
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- Houston & T. C. Ry. Co. v. Bathe, 90 S. W. 55. Writ of error refused.
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- Houston & T. C. Ry. Co. v. Burnett, 108 S. W. 404. Writ of error refused.
- Houston & T. C. Ry. Co. v. Cheatham, 113 S. W. 777. Writ of error refused.
- Houston & T. C. Ry. Co. v. Cluck, 72 S. W. 83. Writ of error refused.
- Houston & T. C. Ry. Co. v. Cluck, 84 S. W. 852. Writ of error granted. 99 T. 130.
- Houston & T. C. Ry. Co. v. Copley, 87 S. W. 219. Writ of error refused.
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- Houston & T. C. Ry. Co. v. Everett, 86 S. W. 17. Writ of error granted. 99 T. 269.

- Houston & T. C. Ry. Co. v. Fanning, 91 S. W. 344. Writ of error refused.
- Houston & T. C. Ry. Co. v. Finn, 107 S. W. 94. Writ of error granted. 101 T. 511.
- Houston & T. C. Ry. Co. v. Goodman, 85 S. W. 492. Writ of error refused.
- Houston & T. C. Ry. Co. v. Gray, 85 S. W. 838. Writ of error refused.
- Houston & T. C. Ry. Co. v. Grych, 103 S. W. 703. Writ of error refused.
- Houston & T. C. Ry. Co. v. Harris, 70 S. W. 335. Writ of error refused.
- Houston & T. C. Ry. Co. v. Helm, 93 S. W. 697. Writ of error dismissed.
- Houston & T. C. Ry. Co. v. Hollingsworth, 68 S. W. 724. Writ of error dismissed.
- Houston & T. C. Ry. Co. v. Hopson, 62 S. W. 458. Writ of error refused.
- Houston & T. C. R. Co. v. Jennings, 81 S. W. 822. Writ of error refused.
- Houston & T. C. Ry. Co. v. Kalitta, 108 S. W. 175. Writ of error refused.
- Houston & T. C. Ry. Co. v. Kauffmann, 101 S. W. 817. Writ of error refused.
- Houston & T. C. Ry. Co. v. Keeling, 112 S. W. 818. Certified question. 121 S. W. 597.
- Houston & T. C. Ry. Co. v. Lamair, 119 S. W. 1162. Writ of error refused.
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- Hunter v. Adoue, 86 S. W. 622. Writ of error refused.
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- Johnston v. Arrendale*, 71 S. W. 45. Writ of error refused.
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- Jolly v. Missouri, K. & T. Ry. Co.*, 85 S. W. 837. Writ of error refused.
- Jones v. Carter*, 101 S. W. 514. Writ of error refused.
- Jones v. City of Houston*, 99 S. W. 750. Writ of error refused.

- Jones v. Dowlen, 63 S. W. 938. Writ of error refused.
- Jones v. Ft. Worth & R. G. Ry. Co., 85 S. W. 37. Writ of error refused.
- Jones v. Humphreys, 88 S. W. 403. Writ of error refused.
- Jones v. Lehman, 81 S. W. 1002. Writ of error refused.
- Jones v. Mexican Central Ry. Co., 68 S. W. 186. Writ of error refused.
- Jones v. National C. O. Co., 72 S. W. 248. Writ of error refused.
- Jones v. Robb, 80 S. W. 395. Writ of error refused.
- Jones v. State, 81 S. W. 1010. Writ of error refused.
- Jones v. Wright, 81 S. W. 569. Writ of error granted. 98 T. 457.
- Jones v. Wright, 92 S. W. 1010. Writ of error refused.
- Joy v. Liverpool Ins. Co., 74 S. W. 822. Writ of error refused.
- June v. Drake, 80 S. W. 402. Writ of error refused.
- Junkbecker v. Huber, 101 S. W. 522. Writ of error granted. 101 T. 148.
- Kaack v. Stanton, 112 S. W. 702. Writ of error refused.
- Kahle v. Stone. Writ of error granted. 95 T. 106.
- Kalteyer v. Mitchell, 110 S. W. 462. Writ of error granted. 102 T. 390.
- Kampman v. Rothwell, 107 S. W. 120. Writ of error granted. 101 T. 535.
- Kampman v. Sullivan, 63 S. W. 173. Writ of error refused.
- Katzenstein v. Reid, 91 S. W. 360. Writ of error refused.
- Keck v. Woodward, 116 S. W. 75. Writ of error refused.
- Keen v. Featherstone, 69 S. W. 983. Writ of error refused.
- Keith v. Rubrey, 127 S. W. 278. Writ of error refused.
- Keller v. Alexander, 58 S. W. 637. Writ of error refused.
- Keller v. Ketter, 67 S. W. 907. Writ of error refused.
- Keller v. Liverpool, L. & G. Ins. Co., 65 S. W. 695. Writ of error refused.
- Kelley v. Short, 75 S. W. 877. Writ of error refused.
- Kelsey v. Collins, 108 S. W. 793. Writ of error refused.
- Kempner v. Advance T. Co., 54 C. A. 650. Writ of error refused.
- Kempner v. State, 72 S. W. 888. Writ of error refused.
- Kendall v. Morrison, 77 S. W. 31. Writ of error refused.
- Kennedy v. Aetna Life Ins. Co., 72 S. W. 602. Writ of error refused.
- Kennedy v. Pearson, 109 S. W. 280. Writ of error refused.
- Kenson v. Gage, 79 S. W. 605. Writ of error refused.
- Kerr v. Blair, 105 S. W. 548. Writ of error refused.
- Kesterson v. Bailey, 80 S. W. 97. Writ of error refused.
- Kettle v. City of Dallas, 80 S. W. 874. Writ of error refused.
- Kettler B. M. Co. v. O'Neill, 122 S. W. 900. Writ of error refused.
- Keystone M. C. Co. v. Peach R. L. Co., 96 S. W. 64. Writ of error dismissed.
- Kidd v. McCrackne, 134 S. W. 839. Writ of error granted.

- Kidd v. Truett, 68 S. W. 310. Writ of error dismissed.
Kilgore v. Jackson, 118 S. W. 819. Writ of error refused.
Kilmer v. Brown, 67 S. W. 1090. Writ of error refused.
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King v. Murray, 135 S. W. 255. Writ of error refused.
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Kirby Lumber Co. v. Owens, 120 S. W. 936. Writ of error refused.
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Kirby v. Boaz, 91 S. W. 642. Writ of error dismissed.
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refused.
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Kruegel v. Daniels, 109 S. W. 1108. Writ of error refused.
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- Kruegel v. Jones, 121 S. W. 218. Writ of error refused.
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 Kruegel v. Morgan, 93 S. W. 1095. Writ of error dismissed.
 Kruegel v. Nash, 68 S. W. 61. Writ of error dismissed.
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 Kuck v. Dixon, 127 S. W. 910. Writ of error refused.
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- Lee v. British A. M. Co., 70 S. W. 775. Writ of error refused.
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- Lone Star L. M. Co. v. Cadwell, 134 S. W. 841. Writ of error refused.
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- Loneragan v. San Antonio L. & T. Co., 104 S. W. 1061. Writ of error refused.
- Long v. Chicago, R. I. & T. Ry. Co., 65 S. W. 82. Writ of error dismissed.
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- Louisiana & T. L. Co. v. Brown, 109 S. W. 1097. Writ of error refused.
- Louisiana & T. L. Co. v. Dupuy, 113 S. W. 973. Writ of error dismissed.
- Louthian v. Ft. Worth & D. C. Ry. Co., 111 S. W. 665. Writ of error refused.
- Lovejoy v. Rotan Grocery Co., 88 S. W. 1134. Writ of error refused.
- Low v. Gray, 130 S. W. 270. Writ of error refused.
- Lowry v. Carter, 102 S. W. 930. Writ of error refused.
- Lowry v. Haynes, 98 S. W. 1068. Writ of error refused.
- Lufkin L. & L. Co. v. Noble, 127 S. W. 1093. Writ of error refused.
- Luhn v. Fordtran, 53 C. A. 148. Writ of error refused.
- Lumkin v. Story, 134 S. W. 298. Writ of error refused.
- Lumpkin v. Jaquess, 71 S. W. 618. Writ of error refused.
- Lumpkin v. Woods, 135 S. W. 1139. Writ of error granted.
- Lutcher v. Allen, 95 S. W. 572. Writ of error refused.
- Luttrell v. Murphy, 120 S. W. 905. Writ of error refused.
- Lwellyn v. Ellis, 115 S. W. 84. Certified question. 102 T. 297.
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- Lynch v. Pittman, 73 S. W. 862. Writ of error refused.
- Lyons v. Carter T. Co., 62 S. W. 559. Writ of error refused.
- Lyster v. Leighton, 81 S. W. 1033. Writ of error refused.
- Lytle v. Crescent N. & H. Co., 66 S. W. 240. Writ of error refused.
- McAdams v. Hooks, 104 S. W. 432. Writ of error dismissed.
- McAdoo v. Williams, 54 C. A. 562. Writ of error refused.
- McAllen v. Raphael, 96 S. W. 760. Writ of error refused.
- McAnnally v. Vickey, 79 S. W. 857. Writ of error refused.
- McBride v. Burns, 88 S. W. 394. Writ of error dismissed.
- McCabe v. Farrell, 77 S. W. 1049. Writ of error refused.
- McCabe v. San Antonio T. Co., 88 S. W. 387. Writ of error refused.
- McCarty v. Woods, 87 S. W. 405. Writ of error refused.

- McClalahan v. Marshall, 80 S. W. 862. Writ of error refused.
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- McLendon v. Bumpass, 114 S. W. 462. Writ of error refused.
- McLennan County v. Frost, 75 S. W. 876. Writ of error dismissed.
- McLennan County v. Primm, 75 S. W. 1132. Writ of error refused.
- McMahon v. McDonald, 113 S. W. 322. Writ of error refused.
- McMurry v. Columbia L. Co., 120 S. W. 246. Writ of error refused.
- McNeil v. Cage, 85 S. W. 57. Writ of error refused.
- McSween v. Board of School Trustees, 128 S. W. 209. Writ of error refused.
- McWilliams v. Thomas, 74 S. W. 596. Writ of error refused.
- Mabry v. Citizens L. Co., 105 S. W. 1156. Writ of error refused.
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- Maddox v. Adair, 66 S. W. 811. Writ of error refused.
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- Maffl v. Stephens, 108 S. W. 414. Writ of error refused.
- Magerstadt v. Lambert, 87 S. W. 1068. Writ of error refused.
- Malone v. Fisher, 71 S. W. 996. Writ of error refused.
- Manery v. Evers, 77 S. W. 428, 969. Writ of error refused.
- Mangum v. Mann, 95 S. W. 605. Writ of error dismissed.
- Mann v. Hossack, 96 S. W. 767. Writ of error refused.
- Mann v. Wilson, 86 S. W. 1061. Writ of error refused.
- Mansfield v. Wardlow, 91 S. W. 859. Writ of error refused.
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- Marshall v. Atkins, 127 S. W. 1148. Writ of error dismissed.
- Marshall v. State Bank, 127 S. W. 1083. Writ of error refused.
- Marshall & E. T. R. Co. v. Crabb, 136 S. W. 825. Writ of error refused.
- Marshall Nat. Bank v. Smith, 77 S. W. 237. Writ of error refused.
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- Martin v. Mitchell, 74 S. W. 565. Writ of error dismissed.
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- Micheal v. Micheal, 91 S. W. 239. Writ of error dismissed.
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- Middleton v. Johnston, 110 S. W. 789. Writ of error refused.
- Midland Co. v. Slaughter, 130 S. W. 612. Writ of error refused.
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- Miles v. Coleman Nat. Bank, 84 S. W. 284. Writ of error refused.
- Miller v. Freeman, 127 S. W. 302. Writ of error refused.
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- Miller v. Miller, 78 S. W. 1085. Writ of error refused.
- Miller v. Tyson, 100 S. W. 1199. Writ of error refused.
- Mills v. City of San Antonio, 65 S. W. 1120. Writ of error refused.
- Mills v. Needham, 67 S. W. 1097. Writ of error refused.
- Milwaukee M. I. Co. v. Frosch, 130 S. W. 600. Writ of error refused.
- Minter v. Hawkins, 117 S. W. 172. Writ of error refused.
- Missouri, K. & T. R. Co. v. Allen, 115 S. W. 1179. Writ of error refused.
- Missouri, K. & T. R. Co. v. Anderson, 81 S. W. 781. Writ of error refused.
- Missouri, K. & T. R. Co. v. Avery, 94 S. W. 935. Writ of error refused.
- Missouri, K. & T. R. Co. v. Avis, 91 S. W. 877. Writ of error granted. 100 T. 33.
- Missouri, K. & T. R. Co. v. Bacon, 80 S. W. 572. Writ of error refused.
- Missouri, K. & T. R. Co. v. Bailey, 68 S. W. 803. Writ of error refused.
- Missouri, K. & T. R. Co. v. Bailey, 53 C. A. 295. Writ of error refused.
- Missouri, K. & T. R. Co. v. Baker, 68 S. W. 556. Writ of error refused.
- Missouri, K. & T. R. Co. v. Baker, 81 S. W. 67. Writ of error refused.
- Missouri, K. & T. R. Co. v. Balliet, 107 S. W. 906. Writ of error refused.
- Missouri, K. & T. R. Co. v. Barnes, 85 S. W. 1006. Writ of error refused.
- Missouri, K. & T. R. Co. v. Barnes, 95 S. W. 714. Writ of error refused.
- Missouri, K. & T. R. Co. v. Blachley, 109 S. W. 995. Writ of error refused.
- Missouri, K. & T. R. Co. v. Blackman, 74 S. W. 74. Writ of error refused.

- Missouri, K. & T. R. Co. v. Blalack, 128 S. W. 706. Writ of error refused.
- Missouri, K. & T. R. Co. v. Bodie, 74 S. W. 100. Writ of error refused.
- Missouri, K. & T. R. Co. v. Box, 93 S. W. 134. Writ of error refused.
- Missouri, K. & T. R. Co. v. Briscoe, 109 S. W. 453. Writ of error granted. 102 T. 505.
- Missouri, K. & T. R. Co. v. Buchanan, 72 S. W. 96. Writ of error refused.
- Missouri, K. & T. R. Co. v. Busk, 120 S. W. 224. Writ of error refused.
- Missouri, K. & T. R. Co. v. Butts, 132 S. W. 88. Writ of error refused.
- Missouri, K. & T. R. Co. v. Byrd, 89 S. W. 991. Writ of error refused.
- Missouri, K. & T. R. Co. v. Calkins, 79 S. W. 852. Writ of error refused.
- Missouri, K. & T. R. Co. v. Cannady, 82 S. W. 1069. Writ of error refused.
- Missouri, K. & T. R. Co. v. Capitol C. Co., 110 S. W. 1014. Writ of error refused.
- Missouri, K. & T. R. Co. v. Cardwell, 70 S. W. 103. Writ of error refused.
- Missouri, K. & T. R. Co. v. Carter, 104 S. W. 910. Writ of error refused.
- Missouri, K. & T. R. Co. v. Coffy, 68 S. W. 721. Writ of error refused.
- Missouri, K. & T. R. Co. v. Corse, 101 S. W. 522. Writ of error refused.
- Missouri, K. & T. R. Co. v. Cowles, 67 S. W. 1078. Writ of error granted. 96 T. 24.
- Missouri, K. & T. R. Co. v. Criswell, 103 S. W. 695. Writ of error granted. 101 T. 399.
- Missouri, K. & T. R. Co. v. Crum, 81 S. W. 72. Writ of error refused.
- Missouri, K. & T. R. Co. v. Dalton, 120 S. W. 240. Writ of error refused.
- Missouri, K. & T. R. Co. v. Davidson, 93 S. W. 436. Writ of error granted. 101 T. 534.
- Missouri, K. & T. R. Co. v. Davis, 108 S. W. 1022. Writ of error refused.
- Missouri, K. & T. R. Co. v. Dawson, 109 S. W. 1110. Writ of error refused.
- Missouri, K. & T. R. Co. v. Dean, 89 S. W. 797. Writ of error refused.

- Missouri, K. & T. R. Co. v. Denton, 68 S. W. 336. Writ of error refused.
- Missouri, K. & T. R. Co. v. Dickson, 90 S. W. 507. Writ of error refused.
- Missouri, K. & T. R. Co. v. Dilworth, 65 S. W. 502. Writ of error granted. 95 T. 327.
- Missouri, K. & T. R. Co. v. Dumas, 93 S. W. 493. Writ of error refused.
- Missouri, K. & T. R. Co. v. Edwards, 67 S. W. 891. Writ of error refused.
- Missouri, K. & T. R. Co. v. Elliott, 93 S. W. 706. Writ of error refused.
- Missouri, K. & T. R. Co. v. Eyer, 69 S. W. 453. Writ of error granted. 96 T. 72.
- Missouri, K. & T. R. Co. v. Farris, 120 S. W. 535. Writ of error refused.
- Missouri, K. & T. R. Co. v. Ferris, 99 S. W. 896. Writ of error refused.
- Missouri, K. & T. R. Co. v. Flood, 79 S. W. 1106. Writ of error refused.
- Missouri, K. & T. R. Co. v. Follis, 68 S. W. 810. Writ of error refused.
- Missouri, K. & T. R. Co. v. Foster, 78 S. W. 1134. Writ of error granted. 97 T. 618.
- Missouri, K. & T. R. Co. v. Foster, 87 S. W. 879. Writ of error refused.
- Missouri, K. & T. R. Co. v. Freeman, 73 S. W. 542. Writ of error granted. 97 T. 394.
- Missouri, K. & T. R. Co. v. Gaines, 79 S. W. 1104. Writ of error refused.
- Missouri, K. & T. R. Co. v. Garrett, 96 S. W. 53. Writ of error refused.
- Missouri, K. & T. R. Co. v. Gargeart, 81 S. W. 325. Writ of error refused.
- Missouri, K. & T. R. Co. v. Gentry, 70 S. W. 562. Writ of error refused.
- Missouri, K. & T. R. Co. v. Gilbert, 124 S. W. 434. Writ of error refused.
- Missouri, K. & T. R. Co. v. Gist, 73 S. W. 857. Writ of error refused.
- Missouri, K. & T. R. Co. v. Godair C. Co., 87 S. W. 871. Writ of error refused.
- Missouri, K. & T. R. Co. v. Goss, 72 S. W. 94. Writ of error refused.
- Missouri, K. & T. R. Co. v. Gray, 120 S. W. 527. Writ of error refused.

- Missouri, K. & T. R. Co. v. Green, 99 S. W. 573. Writ of error refused.
- Missouri, K. & T. R. Co. v. Greenwood, 89 S. W. 810. Writ of error refused.
- Missouri, K. & T. R. Co. v. Groseclose, 134 S. W. 736. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hagan, 93 S. W. 1014. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hagler, 112 S. W. 783. Writ of error dismissed.
- Missouri, K. & T. R. Co. v. Haltom, 62 S. W. 800; 63 S. W. 338. Writ of error granted. 95 T. 112.
- Missouri, K. & T. R. Co. v. Hammer, 78 S. W. 708. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hansen, 90 S. W. 1112. Writ of error dismissed.
- Missouri, K. & T. R. Co. v. Harris, 101 S. W. 506. Writ of error refused.
- Missouri, K. & T. R. Co. v. Harrison, 77 S. W. 1036. Writ of error granted. 97 T. 611.
- Missouri, K. & T. R. Co. v. Harrison, 120 S. W. 254. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hawk, 69 S. W. 1037. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hawkins, 109 S. W. 221. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hay, 86 S. W. 954. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hendricks, 108 S. W. 745. Writ of error refused.
- Missouri, K. & T. R. Co. v. Henserlang, 86 S. W. 948. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hibbitts, 109 S. W. 229. Writ of error refused.
- Missouri, K. & T. R. Co. v. Holland, 107 S. W. 642. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hood, 120 S. W. 236. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hooten, 84 S. W. 1095. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hoskins, 79 S. W. 369. Writ of error refused.
- Missouri, K. & T. R. Co. v. Houlhan, 93 S. W. 495. Writ of error refused.
- Missouri, K. & T. R. Co. v. Housman, 127 S. W. 251. Writ of error refused.

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- Missouri, K. & T. R. Co. v. Huddleston, 81 S. W. 64. Writ of error refused.
- Missouri, K. & T. R. Co. v. Hudgins, 127 S. W. 1133. Writ of error refused.
- Missouri, K. & T. R. Co. v. Huff, 78 S. W. 249. Writ of error granted. 98 T. 110.
- Missouri, K. & T. R. Co. v. Hutchens, 80 S. W. 415. Writ of error refused.
- Missouri, K. & T. R. Co. v. Jackson, 88 S. W. 406. Writ of error refused.
- Missouri, K. & T. R. Co. v. Jarrel, 86 S. W. 632. Writ of error refused.
- Missouri, K. & T. R. Co. v. Johnson, 67 S. W. 769. Writ of error granted. 95 T. 409.
- Missouri, K. & T. R. Co. v. Jones, 80 S. W. 852. Writ of error refused.
- Missouri, K. & T. R. Co. v. Jones, 75 S. W. 53. Writ of error refused.
- Missouri, K. & T. R. Co. v. Keahey, 83 S. W. 1101. Writ of error refused.
- Missouri, K. & T. R. Co. v. Keefe, 84 S. W. 674. Writ of error refused.
- Missouri, K. & T. R. Co. v. Kellerman, 87 S. W. 401. Writ of error refused.
- Missouri, K. & T. R. Co. v. Kennedy, 112 S. W. 339. Writ of error refused.
- Missouri, K. & T. R. Co. v. Kyser, 87 S. W. 389. Writ of error refused.
- Missouri, K. & T. R. Co. v. Lasater, 53 C. A. 51. Writ of error refused.
- Missouri, K. & T. R. Co. v. Lee, 103 S. W. 654. Writ of error refused.
- Missouri, K. & T. R. Co. v. Letot, 135 S. W. 656. Writ of error dismissed.
- Missouri, K. & T. R. Co. v. Lightfoot, 106 S. W. 395. Writ of error refused.
- Missouri, K. & T. R. Co. v. Lynch, 90 S. W. 511. Writ of error refused.
- Missouri, K. & T. R. Co. v. Malone, 110 S. W. 958. Writ of error granted. 102 T. 269.
- Missouri, K. & T. R. Co. v. McDuffy, 109 S. W. 1104. Writ of error refused.
- Missouri, K. & T. R. Co. v. McFarland, 75 S. W. 811. Writ of error refused.
- Missouri, K. & T. R. Co. v. McGregor, 68 S. W. 711. Writ of error refused.

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Missouri, K. & T. R. Co. v. Matherly, 81 S. W. 589.	Writ of error refused.
Missouri, K. & T. R. Co. v. Matlock, 99 S. W. 1052.	Writ of error refused.
Missouri, K. & T. R. Co. v. Mayfield, 68 S. W. 807.	Writ of error refused.
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Missouri, K. & T. R. Co. v. Morgan, 108 S. W. 724.	Writ of error refused.
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- Missouri, K. & T. R. Co. v. Purdy, 83 S. W. 37. Writ of error granted. 98 T. 557.
- Missouri, K. & T. R. Co. v. Raney, 99 S. W. 588. Writ of error refused.
- Missouri, K. & T. R. Co. v. Ray, 63 S. W. 912. Writ of error refused.
- Missouri, K. & T. R. Co. v. Reasor, 68 S. W. 332. Writ of error refused.
- Missouri, K. & T. R. Co. v. Redus, 107 S. W. 63. Writ of error dismissed.
- Missouri, K. & T. R. Co. v. Reynolds, 136 S. W. 279. Writ of error refused.
- Missouri, K. & T. R. Co. v. River Hd. Farm, 117 S. W. 1049. Writ of error refused.
- Missouri, K. & T. R. Co. v. Rothenberg, 131 S. W. 1157. Writ of error refused.
- Missouri, K. & T. R. Co. v. Russell, 88 S. W. 379. Writ of error refused.
- Missouri, K. & T. R. Co. v. Saunders, 103 S. W. 457. Writ of error granted. 101 T. 255.
- Missouri, K. & T. R. Co. v. Scarborough, 68 S. W. 196. Writ of error refused.
- Missouri, K. & T. R. Co. v. Schwatter, 134 S. W. 826. Writ of error refused.
- Missouri, K. & T. R. Co. v. Schilling, 75 S. W. 64. Writ of error refused.
- Missouri, K. & T. R. Co. v. Scroeder, 100 S. W. 808. Writ of error refused.
- Missouri, K. & T. R. Co. v. Seley, 72 S. W. 89. Writ of error refused.
- Missouri, K. & T. R. Co. v. Shannon, 97 S. W. 527. Writ of error granted. 100 T. 379.
- Missouri, K. & T. R. Co. v. Sherrill, 72 S. W. 429. Writ of error refused.
- Missouri, K. & T. R. Co. v. Sloan, 91 S. W. 243. Writ of error refused.
- Missouri, K. & T. R. Co. v. Smith, 68 S. W. 543. Writ of error refused.
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- Missouri, K. & T. R. Co. v. Smith, 99 S. W. 743. Writ of error refused.
- Missouri, K. & T. R. Co. v. Smith, 100 S. W. 182. Writ of error refused.
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- Missouri, K. & T. R. Co. v. Snow, 53 C. A. 184. Writ of error refused.
- Missouri, K. & T. R. Co. v. Snowden, 99 S. W. 865. Writ of error refused.
- Missouri, K. & T. R. Co. v. Stanfield, 90 S. W. 517. Writ of error refused.
- Missouri, K. & T. R. Co. v. State, 93 S. W. 766. Writ of error dismissed. 100 T. 426.
- Missouri, K. & T. R. Co. v. State, 100 S. W. 462. Writ of error granted. 100 T. 420.
- Missouri, K. & T. R. Co. v. State, 109 S. W. 867. Writ of error granted. 102 T. 153.
- Missouri, K. & T. R. Co. v. Steele, 110 S. W. 171. Writ of error refused.
- Missouri, K. & T. R. Co. v. Stinson, 78 S. W. 984. Writ of error refused.
- Missouri, K. & T. R. Co. v. Taff, 74 S. W. 89. Writ of error refused.
- Missouri, K. & T. R. Co. v. Thomas, 107 S. W. 868. Writ of error refused.
- Missouri, K. & T. R. Co. v. Waggoner, 109 S. W. 971. Writ of error granted. 102 T. 260.
- Missouri, K. & T. R. Co. v. Walden, 66 S. W. 584. Writ of error refused.
- Missouri, K. & T. R. Co. v. Wall, 110 S. W. 453. Writ of error granted. 102 T. 362.
- Missouri, K. & T. R. Co. v. Wallace, 53 C. A. 127. Writ of error refused.
- Missouri, K. & T. R. Co. v. Warner, 70 S. W. 365. Writ of error refused.
- Missouri, K. & T. R. Co. v. Watson, 81 S. W. 1276. Writ of error refused.
- Missouri, K. & T. R. Co. v. Weatherford, 62 S. W. 101. Writ of error refused.
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- Missouri, K. & T. R. Co. v. Williams, 68 S. W. 805. Writ of error refused.
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- Missouri, K. & T. R. Co. v. Wise, 109 S. W. 112. Writ of error granted. 101 T. 459.
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- Mitchell v. Commanche C. O. Co., 113 S. W. 158. Writ of error refused.
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- Moore v. Boyd, 79 S. W. 647. Writ of error refused.
- Moore v. Hanscom, 103 S. W. 665. Writ of error granted. 101 T. 293.
- Moore v. Missouri, K. & T. R. Co., 69 S. W. 997. Writ of error refused.
- Moore v. Pierson, 93 S. W. 1007. Writ of error granted. 100 T. 113.
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- Moore v. U. S. Fid. & G. Co., 113 S. W. 947. Writ of error refused.
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- Morgan v. Barber, 99 S. W. 730. Writ of error refused.
- Morgan v. Fleming, 133 S. W. 736. Writ of error refused.
- Morgan v. Missouri, K. & T. R. Co., 110 S. W. 978. Writ of error refused.
- Morgan v. Oliver, 80 S. W. 111. Writ of error granted. 98 T. 218.
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- Morris v. Jacks, 96 S. W. 637. Writ of error refused.
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- National C. O. Co. v. State, 72 S. W. 615. Writ of error refused.
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- North v. Coughran, 108 S. W. 165. Writ of error refused.
- North America A. I. Co. v. Bowen, 102 S. W. 163. Writ of error refused.
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- Northern Texas T. Co. v. Caldwell, 99 S. W. 869. Writ of error refused.
- Northern Texas Tr. Co. v. Danforth, 53 S. W. 419. Writ of error refused.
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- Northern Texas T. Co. v. Lewis, 83 S. W. 894. Writ of error refused.
- Northern Texas T. Co. v. Mullins, 99 S. W. 433. Writ of error refused.
- Northern Texas T. Co. v. Roye, 86 S. W. 621. Writ of error refused.
- Northern Texas T. Co. v. Smith, 110 S. W. 774. Writ of error refused.
- Northern Texas T. Co. v. Thompson, 95 S. W. 708. Writ of error refused.
- Northwestern N. L. I. Co. v. Blasingame, 85 S. W. 819. Writ of error refused.
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- Norton v. Thomas, 98 S. W. 711. Writ of error refused.
- Norwich U. F. I. Soc. v. Cheaney, 128 S. W. 1163. Writ of error refused.
- Nowlin v. Hall, 79 S. W. 806. Writ of error refused.
- Nowotny v. Grona, 98 S. W. 416. Writ of error refused.
- Noyes v. Smith, 77 S. W. 649. Writ of error refused.
- Oak Cliff S. Co. v. Marsalis, 69 S. W. 176. Writ of error refused.
- Oakes v. Prather, 81 S. W. 557. Writ of error refused.
- O'Brien v. Missouri, K. & T. Ry. Co., 82 S. W. 319. Writ of error refused.
- O'Brien v. Woeltz, 57 S. W. 905. Writ of error granted. 94 T. 148.
- O'Brien v. Camp, 101 S. W. 557. Writ of error refused.
- Odell v. Kennedy, 64 S. W. 802. Writ of error refused.
- O'Farrell v. O'Farrell, 119 S. W. 899. Writ of error dismissed.

- Oar v. Davis, 135 S. W. 710. Writ of error granted.
- Oge v. Galveston, H. & S. A. R. Co., 67 S. W. 147. Writ of error refused.
- Oge v. Frobose, 66 S. W. 688. Writ of error refused.
- Old River R. Irrig. Co. v. Stubbs, 137 S. W. 154. Writ of error refused.
- Olivares v. San Antonio & A. P. Ry. Co., 84 S. W. 248. Writ of error refused.
- Oliver v. Kaster, 101 S. W. 563. Writ of error refused.
- Olchewski v. King, 96 S. W. 665. Writ of error refused.
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- Olcott v. Smith, 70 S. W. 343. Writ of error refused.
- Ollis v. Houston, E. & W. T. Ry. Co., 73 S. W. 30. Writ of error refused.
- Olsen v. Smith, 68 S. W. 320. Writ of error refused.
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- Orient Ins. Co. v. Wingfield, 108 S. W. 788. Writ of error refused.
- Orient T. Co. v. St. Louis T. Co., 127 S. W. 310. Writ of error dismissed.
- Orthweins v. Wichita M. & E. Co., 75 S. W. 364. Writ of error refused.
- Ostrom v. San Antonio, 71 S. W. 304. Writ of error dismissed.
- Ott v. Johnson, 86 S. W. 649. Writ of error dismissed.
- Overby v. Johnson, 94 S. W. 131. Writ of error refused.
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- Owens v. American Nat. Bank, 81 S. W. 988. Writ of error refused.
- Owens v. Foley, 93 S. W. 1003. Writ of error refused.
- Owens v. Jackson, 65 S. W. 1125. Writ of error refused.
- Oxsheer v. Houston, E. & W. T. Ry., 67 S. W. 559. Writ of error refused.
- Pacific Express Co. v. Needham, 94 S. W. 1070. Writ of error refused.
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- Pacific M. Ins. Co. v. Shaffer, 70 S. W. 566. Writ of error dismissed.
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- Panhandle T. & T. Co. v. Kellogg S. B. & S. Co., 132 S. W. 963. Writ of error refused.
- Parham v. Ft. Worth & D. C. R. Co., 113 S. W. 154. Writ of error refused.
- Paris Grocer Co. v. Burks, 99 S. W. 1135. Writ of error granted.
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- Paris O. & C. Co. v. Carstens P. Co., 126 S. W. 1182. Writ of error dismissed.
- Paris & G. N. Ry. Co. v. Calvin, 103 S. W. 428. Writ of error granted.
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- Parish v. Missouri, K. & T. Ry. Co., 76 S. W. 234. Writ of error refused.
- Parker v. Allen, 76 S. W. 74. Writ of error refused.
- Parker v. Anderson, 85 S. W. 856. Writ of error refused.
- Parker v. Bowers, 84 S. W. 380. Writ of error refused.
- Parker v. Citizens Ry. Co., 95 S. W. 38. Writ of error refused.
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- Parline & Orendorff v. Davis, 74 S. W. 951. Writ of error refused.
- Parr v. McGowan, 98 S. W. 950. Writ of error refused.
- Parr v. Thompson, 100 S. W. 792. Writ of error dismissed.
- Parrish v. Mills, 106 S. W. 882. Writ of error granted. 101 T. 276.
- Parrish v. Ralls, 133 S. W. 933. Writ of error refused.
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- Parson v. McKinney, 133 S. W. 1084. Writ of error refused.
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- Patterson v. Knapp, 99 S. W. 125. Writ of error refused.
- Patterson v. Southern Pac. Co., 66 S. W. 308. Writ of error refused.
- Patterson v. Walker, 135 S. W. 612. Writ of error refused.
- Patton v. Bender, 103 S. W. 690. Writ of error refused.
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- Payne v. Supreme Lodge, 108 S. W. 1160. Writ of error refused.
- Peach River L. Co. v. Keystone M. Co., 91 S. W. 387. Writ of error refused.
- Peacock v. Coltran, 99 S. W. 107. Writ of error refused.
- Peacock v. Cummings, 78 S. W. 1002. Writ of error refused.
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- Pearson v. West, 95 S. W. 334. Writ of error granted. 97 S. W. 238.
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- Peck v. Hempstead, 65 S. W. 653. Writ of error refused.
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- Pecos & N. T. Ry. Co. v. Lovelady, 87 S. W. 710. Writ of error refused.

- Pecos & N. T. Ry. Co. v. Railway Commission, 120 S. W. 1055. Writ of error refused.
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- Penn v. Texas Yellow Pine L. Co., 79 S. W. 852. Writ of error refused.
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- Peterson v. Bering Mfg. Co., 67 S. W. 133. Writ of error dismissed.
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- Phillips v. Henry, 135 S. W. 382. Writ of error granted.
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- Prokop v. Gulf, C. & S. F. R. Co., 79 S. W. 101. Writ of error refused.
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- Ross v. Droulhet, 80 S. W. 241. Writ of error refused.
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- St. Louis I. M. & S. Ry. Co. v. Hawkins, 108 S. W. 736. Writ of error refused.
- St. Louis I. M. & S. Ry. v. Gunter, 99 S. W. 152. Writ of error refused.
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- St. Louis I. M. & S. Ry. Co. v. Smith, 107 S. W. 638. Writ of error refused.
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- St. Louis I. M. & S. Ry. v. White, 103 S. W. 673. Writ of error refused.
- St. Louis S. Ry. v. Shipp, 109 S. W. 286. Writ of error refused.
- St. Louis & S. F. Ry. v. Ames, 94 S. W. 1112. Writ of error refused.
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- St. Louis & S. F. Ry. Co. v. Armes, 136 S. W. 1164. Writ of error refused.
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- St. Louis & S. F. Ry. v. Bussong, 90 S. W. 73. Writ of error refused.
- St. Louis & S. F. Ry. v. Byers, 90 S. W. 720. Writ of error refused.
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- St. Louis & S. F. Ry. v. Skaggs, 74 S. W. 783. Writ of error refused.
- St. Louis & S. F. Ry. v. Smith, 99 S. W. 171. Writ of error refused.
- St. Louis & S. F. Ry. v. Ross, 89 S. W. 1105. Writ of error refused.
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- St. Louis & S. F. Ry. Co. v. Taylor, 134 S. W. 819. Writ of error refused.
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- St. Louis S. F. & T. Ry. v. Bolen, 129 S. W. 860. Writ of error refused.
- St. Louis S. F. & T. Ry. v. Collins, 99 S. W. 867. Writ of error refused.
- St. Louis S. F. & T. Ry. v. Houston, 120 S. W. 213. Writ of error refused.
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- St. Louis S. F. & T. Ry. v. Knowles, 99 S. W. 867. Writ of error refused.
- St. Louis S. F. & T. Ry. v. Nance, 101 S. W. 294. Writ of error refused.
- St. Louis S. F. & T. Ry. v. Payne, 104 S. W. 1077. Writ of error refused.
- St. Louis S. F. & T. Ry. v. Shaw, 88 S. W. 807. Writ of error granted. 100 T. 559.
- St. Louis S. F. & T. Ry. v. Smith, 115 S. W. 882. Writ of error refused.
- St. Louis S. W. Ry. v. Abernathy, 68 S. W. 539. Writ of error refused.
- St. Louis S. W. Ry. v. Adams, 58 S. W. 1035. Writ of error dismissed.
- St. Louis S. W. Ry. v. Allen, 117 S. W. 923. Writ of error refused.
- St. Louis S. W. Ry. v. Arkansas & T. G. Co., 95 S. W. 656. Writ of error dismissed.
- St. Louis S. W. Ry. v. Arnold, 74 S. W. 819. Writ of error refused.
- St. Louis S. W. Ry. v. Barnes, 72 S. W. 1041. Writ of error refused.
- St. Louis S. W. Ry. v. Boyd, 105 S. W. 519. Writ of error granted. 101 T. 411.
- St. Louis S. W. Ry. v. Boyd, 119 S. W. 1154. Writ of error refused.
- St. Louis S. W. Ry. v. Boyd, 88 S. W. 509. Writ of error refused.
- St. Louis S. W. Ry. v. Bowles, 72 S. W. 451. Writ of error refused.
- St. Louis S. W. Ry. v. Brown, 69 S. W. 1010. Writ of error refused.
- St. Louis S. W. Ry. v. Browning, 54 C. A. 521. Writ of error refused.
- St. Louis S. W. Ry. v. Bryant, 103 S. W. 237. Writ of error refused.
- St. Louis S. W. Ry. v. Bryant, 103 S. W. 237. Writ of error refused.
- St. Louis S. W. Ry. v. Bryson, 91 S. W. 829. Writ of error refused.
- St. Louis S. W. Ry. v. Burke, 81 S. W. 774. Writ of error refused.
- St. Louis S. W. Ry. v. Byers, 69 S. W. 1009. Writ of error refused.
- St. Louis S. W. Ry. v. Cambron, 131 S. W. 1130. Writ of error refused.
- St. Louis S. W. Ry. v. Campbell, 69 S. W. 451. Writ of error refused.
- St. Louis S. W. Ry. v. Cannon, 81 S. W. 778. Writ of error refused.
- St. Louis S. W. Ry. v. Carwile, 67 S. W. 160. Writ of error refused.
- St. Louis S. W. Ry. v. Chatham, 136 S. W. 111. Writ of error refused.
- St. Louis S. W. Ry. v. Clayton, 54 C. A. 512. Writ of error refused.
- St. Louis S. W. Ry. v. Cleland, 110 S. W. 122. Writ of error refused.

- St. Louis S. W. Ry. v. Coates, 103 S. W. 662. Writ of error refused.
- St. Louis S. W. Ry. v. Connally, 93 S. W. 206. Writ of error refused.
- St. Louis S. W. Ry. v. Cockrill, 111 S. W. 1092. Writ of error refused.
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- St. Louis S. W. Ry. v. Davis, 110 S. W. 939. Writ of error refused.
- St. Louis S. W. Ry. v. Dixon, 91 S. W. 626. Writ of error refused.
- St. Louis S. W. Ry. v. Duck, 69 S. W. 1027. Writ of error refused.
- St. Louis S. W. Ry. v. Eckles, 53 S. W. 125. Writ of error refused.
- St. Louis S. W. Ry. v. Edwards, 134 S. W. 264. Writ of error granted.
- St. Louis S. W. Ry. v. Ferguson, 64 S. W. 797. Writ of error refused.
- St. Louis S. W. Ry. v. Foster, 103 S. W. 194. Writ of error refused.
- St. Louis S. W. Ry. v. Frazier, 87 S. W. 400. Writ of error refused.
- St. Louis S. W. Ry. v. Gammage, 96 S. W. 645. Writ of error refused.
- St. Louis S. W. Ry. v. Garber, 111 S. W. 227. Writ of error refused.
- St. Louis S. W. Ry. v. Gentry, 98 S. W. 226. Writ of error refused.
- St. Louis S. W. Ry. v. Gentry, 95 S. W. 74. Writ of error refused.
- St. Louis S. W. Ry. v. Goodnight, 74 S. W. 583. Writ of error refused.
- St. Louis S. W. Ry. v. Greer, 127 S. W. 270. Writ of error refused.
- St. Louis S. W. Ry. v. Groves, 97 S. W. 1084. Writ of error refused.
- St. Louis S. W. Ry. v. Hall, 81 S. W. 571. Writ of error granted. 98 T. 480.
- St. Louis S. W. Ry. v. Haney, 94 S. W. 386. Writ of error refused.
- St. Louis S. W. Ry. v. Harkey, 88 S. W. 506. Writ of error refused.

- St. Louis S. W. Ry. v. Harrison, 73 S. W. 38. Writ of error refused.
- St. Louis S. W. Ry. v. Hawkins, 49 C. A. 545. Writ of error refused.
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- St. Louis S. W. Ry. v. Highmate, 84 S. W. 365. Writ of error granted. 99 T. 23.
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- St. Louis S. W. Ry. v. Hughes, 73 S. W. 976. Writ of error dismissed.
- St. Louis S. W. Ry. Co. v. Hyson, 107 S. W. 625. Writ of error granted. 101 T. 543.
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- St. Louis S. W. Ry. v. Johnson, 125 S. W. 632. Writ of error refused.
- St. Louis S. W. Ry. v. Johnson, 68 S. W. 58. Writ of error refused.
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- St. Louis S. W. Ry. v. Keltt, 76 S. W. 311. Writ of error refused.
- St. Louis S. W. Ry. v. Kelton, 66 S. W. 887. Writ of error refused.
- St. Louis S. W. Ry. v. Kennenmoe, 818 S. W. 802. Writ of error refused.
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- St. Louis S. W. Ry. v. Laws, 61 S. W. 498. Writ of error refused.
- St. Louis S. W. Ry. v. Lindsey, 81 S. W. 87. Writ of error refused.
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- St. Louis S. W. Ry. v. Lovelady, 81 S. W. 1040. Writ of error refused.
- St. Louis S. W. Ry. v. Lowe, 97 S. W. 1087. Writ of error refused.
- St. Louis S. W. Ry. v. McArthur, 72 S. W. 76. Writ of error refused.
- St. Louis S. W. Ry. v. McCauley, 134 S. W. 798. Writ of error refused.
- St. Louis S. W. Ry. v. McDowell, 73 S. W. 974. Writ of error refused.

- St. Louis S. W. Ry. v. Marshall, 120 S. W. 512. Writ of error refused.
- St. Louis S. W. Ry. v. Martin, 87 S. W. 387. Writ of error refused.
- St. Louis S. W. Ry. v. Matthews, 79 S. W. 71. Writ of error refused.
- St. Louis S. W. Ry. v. Mitchell, 127 S. W. 876. Writ of error refused.
- St. Louis S. W. Ry. v. Miller, 66 S. W. 139. Writ of error refused.
- St. Louis S. W. Ry. v. Moore, 107 S. W. 658. Writ of error refused.
- St. Louis S. W. Ry. v. Morgan, 98 S. W. 408. Writ of error refused.
- St. Louis S. W. Ry. v. Morrow, 93 S. W. 162. Writ of error refused.
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- St. Louis S. W. Ry. v. Sheeler, 102 S. W. 783. Writ of error refused.
- St. Louis S. W. Ry. Co. v. Shipp, 109 S. W. 286. Writ of error refused.
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- San Antonio & A. P. Ry. v. Connell, 66 S. W. 246. Writ of error refused.
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- San Antonio G. & E. Co. v. Badders, 103 S. W. 229. Writ of error refused.
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- San Antonio L. & P. Co. v. Moore, 101 S. W. 867. Writ of error refused.
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- San Antonio Tr. Co. v. Court, 71 S. W. 777. Writ of error refused.
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- Smith v. Texas & N. O. Ry., 127 S. W. 886. Writ of error refused.
- Smith v. Turner, 119 S. W. 992. Writ of error refused.
- Smitherman v. Louisiana & T. L. Co., 130 S. W. 633. Writ of error refused.
- Smithers v. Lowrance, 91 S. W. 606. Writ of error granted. 100 T. 77.
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- Snipes v. Bomar Cotton O. Co., 137 S. W. 428. Writ of error granted.
- Snyder v. Baird School Dist., 109 S. W. 472. Certified question. 102 T. 4.
- Soloman v. Southwestern T. & T. Co., 117 S. W. 214. Writ of error refused.
- Sorrel v. Stowe, 127 S. W. 300. Writ of error refused.
- South B. I. Wks. v. Wagner, 74 S. W. 601. Writ of error refused.
- Southern Con. Co. v. Hinkle, 89 S. W. 308. Writ of error refused.
- Southern K. Ry. v. Burgess, 98 S. W. 189. Writ of error refused.
- Southern K. Ry. v. Cox, 103 S. W. 1122. Writ of error dismissed.
- Southern K. Ry. v. Cox, 95 S. W. 1124. Writ of error refused.
- Southern K. Ry. v. Crump, 74 S. W. 335. Writ of error refused.
- Southern K. Ry. v. Curtis, 99 S. W. 66. Writ of error refused.
- Southern K. Ry. Co. v. Emmett, 139 S. W. 44. Writ of error granted.
- Southern K. Ry. v. Morris, 99 S. W. 433. Writ of error granted. 100 T. 611.
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- Southern K. Ry. v. State, 99 S. W. 166. Writ of error refused.
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- Southern P. Co. v. Anderson, 63 S. W. 1023. Writ of error refused.
- Southern P. Ry. v. Bailey, 91 S. W. 820. Writ of error refused.
- Southern P. Co. v. Black, 128 S. W. 668. Writ of error refused.
- Southern P. Co. v. Craner, 101 S. W. 534. Writ of error refused.
- Southern P. Co. v. D' Arcals, 64 S. W. 813. Writ of error refused.
- Southern P. Co. v. Godfrey, 107 S. W. 1135. Writ of error refused.
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- Southern P. Co. v. Martin, 81 S. W. 77. Writ of error granted. 98 T. 322.
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- Southern P. Co. v. Winton, 66 S. W. 447. Writ of error refused.
- Southern P. Co. v. State Nat. Bk., 79 S. W. 664. Writ of error refused.
- Southern P. Co. v. Harwell, 75 S. W. 52. Writ of error dismissed.
- Southwestern T. & T. Co. v. Evans, 116 S. W. 418. Writ of error refused.
- Southwestern T. & T. Co. v. Gehring, 136 S. W. 754. Writ of error refused.
- Southwestern T. & T. Co. v. San Antonio, 73 S. W. 859. Writ of error refused.
- Southwestern T. & T. Co. v. Solomon, 54 C. A. 306. Writ of error refused.
- Southwestern T. & T. Co. v. Taylor, 63 S. W. 1076. Writ of error refused.
- Southwestern T. & T. Co. v. Tucker, 110 S. W. 481. Writ of error granted. 102 T. 224.
- Southwestern T. & T. Co. v. Younger, 120 S. W. 530. Writ of error refused.
- Southern O. Co. v. Colquitt, 69 S. W. 169. Writ of error refused.
- Southern O. Co. v. State, 72 S. W. 1135. Writ of error refused.
- Southwestern O. Co. v. State, 99 S. W. 159. Writ of error granted. 100 T. 647.
- Sour Lake T. Co. v. Deutser T. Co., 94 S. W. 188. Writ of error refused.
- Southwell v. Church, 111 S. W. 969. Writ of error refused.
- Sovereign Camp v. Brown, 88 S. W. 372. Writ of error dismissed.
- Sovereign C. W. W. v. Gray, 64 S. W. 801. Writ of error refused.
- Spalding v. Aldridge, 110 S. W. 560. Writ of error refused.
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- Sparks v. Hall, 67 S. W. 916. Writ of error refused.
- Sparks v. Ponder, 94 S. W. 428. Writ of error refused.
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- Stacy v. Parker, 132 S. W. 532. Writ of error refused.
- Staley v. Stone, 92 S. W. 1017. Writ of error refused.
- Standard L. & P. Co. v. Munsey, 76 S. W. 931. Writ of error refused.
- Standard U. C. Co. v. Southern I. T. Co., 134 S. W. 429. Writ of error refused.
- Starke v. Coe, 134 S. W. 373. Writ of error dismissed.
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- Starke v. Harris, 106 S. W. 887. Writ of error granted. 101 T. 587.
- State v. Brady, 114 S. W. 895. Writ of error granted. 102 T. 408.
- State v. Brunl, 83 S. W. 209. Writ of error refused.
- State v. Burgess, 107 S. W. 366. Writ of error granted. 101 T. 527.
- State v. Cloutt, 84 S. W. 415. Writ of error refused.
- State v. Colorado B. Co., 75 S. W. 818. Writ of error refused.
- State v. Crumbaugh, 63 S. W. 925. Writ of error refused.
- State v. Davidson, 132 S. W. 520. Writ of error refused.
- State v. Downman, 134 S. W. 787. Writ of error refused.
- State v. Ellis, 130 S. W. 891. Writ of error refused.
- State v. Filmore, 71 S. W. 418. Writ of error refused.
- State v. Fidelity D. Co., 80 S. W. 544. Writ of error refused.
- State v. Galveston C. & S. F. Ry., 120 S. W. 1028. Writ of error refused.
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- State v. Gunter, 81 S. W. 1028. Writ of error refused.
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- State v. International & G. N. Ry., 71 S. W. 994. Writ of error refused.
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- State v. Jadwin, 85 S. W. 490. Writ of error refused.
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- State v. Laredo I. Co., 75 S. W. 1134. Writ of error refused.
- State v. Laskin, 90 S. W. 912. Writ of error refused.
- State v. O'Connor, 71 S. W. 409. Writ of error granted. 96 T. 484.
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- State v. Russell, 85 S. W. 288. Writ of error refused.
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- State v. Shipper's C. & W. Co., 67 S. W. 1049. Writ of error granted. 95 T. 603.
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- State v. Teague, 111 S. W. 234. Writ of error refused.
- State v. Texas & N. O. Ry., 124 S. W. 984. Writ of error refused.
- State v. Trinity & B. T. Ry., 120 S. W. 1123. Writ of error refused.
- State v. Trinity L. & A. Soc., 127 S. W. 1174. Writ of error refused.
- State v. Water's P. O. Co., 67 S. W. 1057. Writ of error refused.
- Steely v. Texas Imp. Co., 119 S. W. 319. Writ of error refused.
- Steger v. Kelley, 136 S. W. 824. Writ of error refused.
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- Stein v. Mentz, 94 S. W. 447. Writ of error refused.
- Stell v. Houston, E. & W. T. Ry., 67 S. W. 537. Writ of error dismissed.
- Stephens v. Hewitt, 77 S. W. 229. Writ of error refused.
- Stephens v. Turley, 131 S. W. 848. Writ of error refused.
- Stephenville O. M. Co. v. McNeill, 122 S. W. 911. Writ of error refused.
- Sterling v. De Laune, 105 S. W. 1169. Writ of error refused.
- Sterling v. St. Louis, I. M. & S. Ry., 86 S. W. 655. Writ of error refused.
- Stevens v. Cameron, 101 S. W. 791. Writ of error granted. 100 T. 515.
- Steves v. Smith, 107 S. W. 141. Writ of error refused.
- Stewart v. El Paso Co., 130 S. W. 590. Writ of error refused.
- Stewart v. Galveston H. & S. A. Ry., 78 S. W. 979. Writ of error refused.
- Stewart v. Nichols, 82 S. W. 339. Writ of error refused.
- Stewart v. Robins, 65 S. W. 899. Writ of error refused.
- Stewart v. Rutter, 107 S. W. 936. Writ of error dismissed.
- Stewart v. Wagley, 68 S. W. 297. Writ of error refused.
- Stipe v. Shirley, 64 S. W. 1012. Writ of error refused.
- Stith v. Moore, 95 S. W. 587. Writ of error refused.
- Stockyards Nat. Bk. v. Smith, 128 S. W. 454. Writ of error refused.
- Stoker v. Fugitt, 113 S. W. 310. Writ of error refused.
- Stone v. Houghton, 135 S. W. 1081. Writ of error refused.
- Stone v. Wolfe, 109 S. W. 981. Writ of error dismissed.
- Stowe v. Byers, 73 S. W. 1086. Writ of error refused.
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- Stratton v. Commissioners Court, 137 S. W. 1170. Writ of error granted.
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- Steet v. Robertson, 66 S. W. 1120. Writ of error refused.
- Stribling v. Gray, 81 S. W. 789. Writ of error refused.
- Strickel v. Thuberville, 67 S. W. 1058. Writ of error refused.
- Stromeyer v. Wing, 77 S. W. 977. Writ of error dismissed.
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- Stubblefield v. Hanson, 94 S. W. 406. Writ of error refused.
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- Stydebaker B. Mfg. Co. v. Hightower, 111 S. W. 1199. Writ of error dismissed.
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Texarkana & Ft. S. R. Co. v. Spencer, 67 S. W. 196. Writ of error refused.
Texarkana & Ft. S. R. Co. v. Toliver, 84 S. W. 375. Writ of error refused.
Texarkana L. Co. v. Lennard, 104 S. W. 509. Writ of error refused.
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- Texas Midland R. Co. v. Cardwell, 67 S. W. 157. Writ of error refused.
- Texas Midland v. Crowder, 60 S. W. 90. Writ of error refused.
- Texas Midland R. Co. v. Dean, 83 S. W. 524. Writ of error granted. 98 T. 517.
- Texas Midland R. Co. v. Edwards, 121 S. W. 570. Writ of error refused.
- Texas Midland R. Co. v. Geraldton, 54 C. A. 71. Writ of error granted.
- Texas Midland R. Co. v. Moore, 74 S. W. 942. Writ of error refused.
- Texas Midland R. Co. v. Morris, 69 S. W. 102. Writ of error dismissed.
- Texas Midland R. Co. v. Ritchey, 108 S. W. 732. Writ of error refused.
- Texas Midland R. Co. v. Scott, 129 S. W. 1170. Writ of error refused.
- Texas Midland R. Co. v. State, 93 S. W. 468. Writ of error refused.
- Texas Moline P. Co. v. Niagara F. I. Co., 87 S. W. 192. Writ of error refused.
- Texas P. C. & L. Co. v. Lee, 82 S. W. 306. Writ of error refused. 98 T. 236.
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- Texas S. V. & N. W. R. Co. v. Reid, 86 S. W. 363. Writ of error refused.
- Texas T. & L. Co. v. Gwin, 68 S. W. 721. Writ of error refused.
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- Texas & N. O. R. Co. v. Barwick, 110 S. W. 953. Writ of error refused.
- Texas & N. O. R. Co. v. Bellar, 112 S. W. 323. Writ of error refused.
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- Texas & N. O. R. Co. v. Buck, 102 S. W. 124. Writ of error granted. 101 T. 200.
- Texas & N. O. R. Co. v. Clippenger, 106 S. W. 155. Writ of error refused.
- Texas & N. O. R. Co. v. Conway, 98 S. W. 1070. Writ of error refused.
- Texas & N. O. R. Co. v. Davidson, 107 S. W. 949. Writ of error refused.

- Texas & N. O. R. Co. v. Faulkner, 131 S. W. 619. Writ of error refused.
- Texas & N. O. R. Co. v. Fields, 74 S. W. 930. Writ of error refused.
- Texas & N. O. R. Co. v. Gardner, 69 S. W. 217. Writ of error refused.
- Texas & N. O. R. Co. v. Gross, 128 S.W. 1173. Writ of error refused.
- Texas & N. O. R. Co. v. Jackson, 113 S. W. 628. Writ of error refused.
- Texas & N. O. R. Co. v. Kelly, 80 S. W. 1073. Writ of error refused.
- Texas & N. O. R. Co. v. Lee, 74 S. W. 345. Writ of error refused.
- Texas & N. O. R. Co. v. McCoy, 117 S. W. 446. Writ of error refused.
- Texas & N. O. R. Co. v. McDonald, 85 S. W. 493. Writ of error granted. 99 T. 207.
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- Texas & N. O. R. Co. v. Middleton, 103 S. W. 203. Writ of error refused.
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- Texas & N. O. R. Co. v. Powell, 112 S. W. 697. Writ of error refused.
- Texas & N. O. R. Co. v. Reed, 54 C. A. 26. Writ of error refused.
- Texas & N. O. R. Co. v. Sabine T. Co., 121 S. W. 256. Writ of error refused.
- Texas & N. O. R. Co. v. Scarborough, 104 S. W. 408. Writ of error granted. 101 T. 436.
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- Texas & N. O. R. Co. v. Sherman, 87 S. W. 887. Writ of error granted. 99 T. 571.
- Texas & N. O. R. Co. v. State, 93 S. W. 469. Writ of error dismissed.
- Texas & N. O. R. Co. v. Taylor, 73 S. W. 1080. Writ of error refused.
- Texas & N. O. R. Co. v. Walton, 104 S. W. 415. Writ of error refused.
- Texas & N. O. R. Co. v. Wells-Fargo Co., 100 S. W. 172. Writ of error granted. 101 T. 564.
- Texas & N. O. R. Co. v. Williams, 114 S. W. 877. Writ of error refused.
- Texas & N. O. R. Co. v. Wright, 71 S. W. 760. Writ of error refused.
- Texas & P. R. Co. v. Abernathy, 58 S. W. 175. Writ of error refused.

- Texas & P. R. Co. v. Adams, 72 S. W. 81. Writ of error refused.
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